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THE

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PUNJAB RECORD,

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Reference Book for Civil Officers.

VOLUME XIII,

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TO

CIVIL JUDGMENTS,

1878.

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from his infancy by K. B., lived with him and was married by him. In 1872 K. B. executed a deed of adoption in which he declared that he, regarding N. M. as his own begotten son, intended that he should inherit all his property. In 1873 K. B. caused mutation of names to be effected. It did not appear that N. M. was put in possession, but on the other hand there was no evidence that between 1873 and his death, K. B. revoked his declaration that N. M. was his adopted son and was to be his heir.—*Held* that, under the circumstances, N. M. was entitled by custom to inherit the property of K. B., ...

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On 29th March 1877 defendant, though his pleader, applied for review of judgment on the grounds that, 1st, the decree on confession of judgment had been passed before the date fixed for hearing, and 2nd, that the confession of judgment had been made without defendant's consent or authority. The application was rejected on the ground that Mahamda Shah's power of attorney gave him power to confess judgment and bind defendant.

Held by Smyth, J., following No. 37, *Punjab Record*, 1877, that defendant was entitled to relief, unless it could be shown that the agent was in point of fact expressly or impliedly authorized to make the confession of judgment sought to be impeached.

Held by Plowden, J., that even if the power of attorney was sufficient in itself, and without any further instrument of authorization to confer upon the agent authority to confess judgment generally, the defendant would be entitled to relief if he could show that the general authority had in the particular case been exercised in such a manner or with such results that it would be unjust to hold him bound by his agent's act.

Per Plowden, J. Under the Code of Civil Procedure, a decree by consent may be set aside by review if the attainment of the ends of justice require it, and, therefore, that if it appeared that the confession of judgment had been made by the agent under such circumstances that it operated as a fraud upon the defendant, or was made in error or acted as a surprise upon him, he would be *prima facie* entitled to the relief sought, ...

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- In execution of that decree a house in the possession of the present plaintiff was attached. He applied for its release on the ground that it had been in his possession for 30 years and was ancestral property, and that the debt sued for had been contracted for an immoral purpose. His application having been rejected he instituted the present suit.
- Held* that, by Hindu law, both ancestral and acquired estates in the hands of a son are upon an equal footing, and not liable for the father's debts if contracted for an immoral purpose; and, therefore, that as the plea that the debts had been contracted for an immoral purpose would have been a complete answer to the former suit, and the plaintiff had omitted to put it forward, he was now estopped from doing so, ... **13**
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and subsequently dispossessed him. The sale deed conveyed to defendant no specific land, but seven-fifteenths of Khata No. 409, which was a joint Khata comprising 460 kanals 10 marlas of land. The Courts below rejected the plaint on defendant refusing to file additional stamps as on a suit valued in accordance with Section 7, Clause V (d) of the Court Fees' Act 1870. Plaintiff appealed, insisting on his right to value the suit at five times the jama under Section 7, Clause V (b), when a preliminary objection was taken that the appeal was barred by Section 12, Clause I.

Held that the defendants' prayer really was for possession jointly with the defendants of Khata No. 409, with an interest therein to the extent of seven-fifteenths, and that the whole Khata being part of an estate paying annual revenue to Government and recorded in the Collector's register as separately assessed with revenue, within the meaning of Clause V (b), the value of the suit must be deemed to be five times the revenue payable on the Khata, ...

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An Appellate Court is only competent to dismiss an appeal for default under Section 346, Act VIII of 1859, when a date has been fixed under Sections 344 and 345 for hearing the appeal.

There is nothing in Section 7, Act IX of 1873, which renders it obligatory upon an appellant whose appeal has been registered to appear in support of his petition, or which authorizes the Appellate Court to dismiss the appeal for default, ...

" " *for default on date of which appellant had no notice—Civil Procedure Code (Act VIII of 1859), Section 346.*—The Judicial Assistant Umballa fixed the 7th June 1877 for hearing an appeal filed in his Court. On 10th May 1877, the date was altered to 22nd May 1877, and the parties ordered to be informed. On 22nd May 1877, neither party being present, the appeal was dismissed for default, though notice of the change of date had not been served upon them. *Held*, that in hearing the appeal on 22nd May 1877, the Judicial Assistant exercised a jurisdiction not vested in him by law, ...

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" " *Sections 2 and 32—Res judicata—Rejection of plaint under Section 32—Institution of new suit on same cause of action.—N. M. and B. D., brothers, with their brother B. were recorded in the Settlement papers as joint owners of a holding. B. D. applied in 1877, in the Revenue department, for partition of his share, and the partition was objected to by N. M. on the ground that the holding had been divided in July 1874 by private partition and was no longer joint. The objection was disallowed, and, on 20th December 1876, a partition was made and sanctioned.*

On 22nd March 1877, N. M. brought a suit against B. D. and B. to cancel the partition made in the Revenue department, but the plaint was on the same day rejected on the ground that under Section 65 of the Punjab Land Revenue Act, 1871, such a suit was not maintainable.

Meanwhile, N. M. appealed to the Commissioner from the order of partition dated 20th December 1876 made by the Revenue authorities, who on 19th July 1877 suspended that order so as to allow N. M. an opportunity to bring a civil suit. Accordingly, on 18th August 1877 N. M. brought a fresh suit against B. D. and B. to prove that the holding had been privately divided in July 1874.

Held, assuming the order in the first suit to have been passed under Section 32, Act VIII of 1859, that the second suit was barred by Section 2, Act VIII of 1859.

Where a plaint is rejected under Section 32, a fresh plaint cannot be entertained on the same cause of action, ...

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" " *Section 17—Recognized Agent—Plaint filed by, without power of attorney—acceptance of plaint—Limitation. On 30th January 1877, (before the period of limitation had expired) plaintiff instituted his suit in the proper Court at Attari. The plaint was presented (without a power of attorney) by plaintiff's daughter-in-law, R., who stated that plaintiff came with her and became extremely ill, that he was lying outside the village, and that as the period of limitation was expiring he had sent her on to file it.*

On the same date the Court directed the plaint to be kept in the office, and R. to bring the plaintiff in person or else a mukhtar-nama from him.

On 19th February 1877 (after the period of limitation had expired) plaintiff was taken to Court in a doolie and attested a mukhtar-nama by which he appointed his nephew J. S. his mukhtar for the purpose of conducting the suit.

Held that a written authority to present the plaint was not necessary in favor of B. acting as recognized agent of the plaintiff under the proviso to Section 17 Act VIII of 1859, added by Punjab.

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Government Notification No. 1225 dated 26th September 1866, and the Court having in fact accepted and retained the plaint it was filed within time,

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Civil Procedure Code, (Act VIII of 1859), Sections 98 and 376.—Decree on confession—Review—Agent, authority of, to confess judgment—Circumstances under which principal is entitled to relief.—On 24th February 1877, plaintiff instituted a suit against defendant to establish his right to the office of Diwan of the khangah of Miran Sahib at Thuska, and to share in the management of the institution. Defendant was summoned for 20th March 1877 for settlement of issues. On 7th March 1877, before the summons was served, defendant's general agent or mukhtar, Mahamda Shah, appeared and confessed judgment, upon which a decree was passed in favour of plaintiff.

On 29th March 1877 defendant, through his pleader, applied for review of judgment on the grounds that, 1st., the decree on confession of judgment had been passed before the date fixed for hearing, and 2nd., that the confession of judgment had been made without defendant's consent or authority. The application was rejected on the ground that Mahamda Shah's power of attorney gave him power to confess judgment and bind defendant.

Held by Smyth, J., following No. 37, *Punjab Record*, 1877, that defendant was entitled to relief, unless it could be shown that the agent was in point of fact expressly or impliedly authorized to make the confession of judgment sought to be impeached.

Held by Plowden, J., that even if the power of attorney was sufficient in itself, and without any further instrument of authorization to confer upon the agent authority to confess judgment generally, the defendant would be entitled to relief if he could show that the general authority had in the particular case been exercised in such a manner or with such results that it would be unjust to hold him bound by his agent's act.

Per Plowden, J., under the Code of Civil Procedure, a decree by consent may be set aside by review if the attainment of the ends of justice require it, and, therefore, that if it appeared that the confession of judgment had been made by the agent under such circumstances that it operated as a fraud upon the defendant, or was made in error or acted as a surprise upon him, he would be *prima facie* entitled to the relief sought,

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22 *Sections 119 and 239—Ex parte decree—Application to set aside, made after time—Discretion of Court to admit—Informality in process of execution under Section 239—Effect of.*—On 28th April 1876 C. H. and W. obtained an *ex parte* decree against J. K., in execution of which certain shops were attached on 29th June 1876. On 2nd August 1876 J. K. applied under Section 119, Act VIII of 1859 to have the *ex parte* decree set aside. The process of execution issued under Section 239, Act VIII of 1859, was informal, because (a) no copy of the prohibitory order was attached to the door of the Court, or other conspicuous part of the Court-house, and (b) the order was not read aloud in any place on or adjacent to the shops sought to be attached.

The references are to the Nos. given to the cases in the "Record."

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Held by PLOWDEN AND ELSMIE, JJ., that no legal process of execution was executed under Section 239 within 30 days of the application made by J. K. on 2nd August 1876, and therefore, that his application was within time.

Per FITZPATRICK AND PLOWDEN, JJ.—A Court has no discretion to set aside, an *ex parte* decree on application made more than 30 days after process for enforcing the decree has been executed, even though it appear that the defendant had, as a matter of fact, not known of the execution till within 30 days before he made his application.

A party insisting upon the provisions of a severe and stringent law, like that relating to *ex parte* decisions, is bound to see that every formality is strictly complied with; where this is not done a Court is bound to hold, for the purposes of Section 119, Act VIII of 1859, that no process has been executed, ...

Civil Procedure Code, (Act VIII of 1859), Section 206—Execution of decree— 32

Payments in satisfaction of, made out of Court, but not certified to the Court.—D. obtained a decree against K. and S. A. for possession of certain mortgaged land, subject to the condition that K. and S. A. were to continue in cultivation thereof for three years, paying D. the proprietors' share of the produce, out of which D. was to pay the Government revenue, and apply the surplus (if any) to paying off the principal debt, and in the event of the principal debt not being paid off, D was to obtain cultivating possession. At the end of three years, D applied for possession under the decree, alleging non-receipt of any payments under it, while K. and S. A. alleged payment in full satisfaction of the principal debt. *Held* that the Court executing the decree was precluded by Section 206, Act VIII of 1859 from recognizing the payments alleged to have been made out of Court, and which were not certified to the Court.

Semble, that even if it was intended that the payments under the decree obtained by D. should be made out of Court, K. and S. A. were not relieved from the duty of seeing that such payments were certified to the Court by D., ...

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” ” Section 346—Act IX of 1873, Section 7—Dismissal of appeal for default.—On 23rd May 1877, appellant filed an appeal in the Judicial Assistant's Court at Umballa, which was ordered to be registered and brought up with the file of the case on 13th June. On that date, appellant being absent, the appeal was dismissed for default under Section 346, Act VIII of 1859, though no notice had issued to respondents, and the date was only fixed under Section 7, Act IX of 1873, for hearing appellant or his pleader in support of his petition of appeal. *Held* that the order of dismissal was illegal.

An Appellate Court is only competent to dismiss an appeal for default under Section 346, Act VIII of 1859, when a date has been fixed under Sections 344 and 345 for hearing the appeal.

There is nothing in Section 7, Act IX of 1873, which renders it obligatory upon an appellant whose appeal has been registered to

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appear in support of his petition, or which authorizes the Appellate Court to dismiss the appeal for default, ...	48
<i>Civil Procedure Code, (Act VIII of 1859), Section 346.—Appeal.—Dismissal for default on date of which appellant had no notice.—The Judicial Assistant Amballa fixed the 7th June 1877 for hearing an appeal filed in his Court. On 10th May 1877, the date was altered to 22nd May 1877, and the parties ordered to be informed. On 22nd May 1877, neither party being present, the appeal was dismissed for default, though notice of the change of date had not been served upon them. Held that in hearing the appeal on 22nd May 1877, the Judicial Assistant exercised a jurisdiction not vested in him by law,</i>	61
<i>" (Act X of 1877) Section 17, explanation 1.—Temporary dwelling place—Cause of action—Jurisdiction—Small Cause Court.—S. D. was sued at Amritsar, where he temporarily resided, in respect of a cause of action which arose at Ajnala. Held that the Small Cause Court at Amritsar had no jurisdiction to entertain the suit.</i>	
<i>A temporary lodging only gives jurisdiction in respect of a cause of action arising at the place where the defendant has such a lodging, ...</i>	75
<i>" " Section 57 (a)—Plaint, return of, after trial on the merits—Power of Appellate Court.—An Appellate Court has power to direct the return of a plaint, notwithstanding a trial upon the merits in the first Court, if it be found that such Court ought to have returned it under Section 57 (a) of Act X of 1877,...</i>	55
<i>" " Sections 266 and 287.—Moveable property—Sale of, in execution of decree—Title acquired by purchaser—Property wrongly attached and sold—Remedies of real owner of goods—Where moveable property belonging to A was attached and sold in execution of a decree against B, held that A was entitled to sue the auction-purchaser for the restoration of the specific moveable or for its value.</i>	
<i>The purchaser of moveable property at an execution sale does not take an absolutely unimpeachable title to the property; and the fact that the real owner may have a remedy by a suit for damages against the execution-creditor for causing the property to be attached and sold does not debar him from bringing a suit to recover the property itself from the auction-purchaser, ...</i>	82
<i>" " Section 617—Reference in case open to appeal—Reference in suit pending when Act X of 1877 came into force—Plaintiffs instituted on 8th August 1877 a suit to cancel one of two decrees passed against them for Rs. 40 in respect of the same cause of action. On 12th November 1877, the Court of first instance referred certain questions of law arising in the suit, for the decision of the Chief Court, under Section 617, Act X of 1877. Held that, as the suit was instituted before 1st October 1877 (the date on which the Act came into force) the procedure prior to decree was not governed by Act X of 1877 (vide last clause of Section 3), and Section 617 did not apply.</i>	

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<i>Per SMYTH, J.—Held further, that the reference was not authorized by Section 617, Act X of 1877, even if the suit had been instituted after 1st October 1877, as any decree which might be passed in the suit would not be final,</i> ...	40
<i>Civil Procedure Code, (Act X of 1877) Section 622—Jurisdiction—Limitation. Held that the plea of limitation is not a question of jurisdiction within the meaning of Section 622, Act X of 1877,</i> ...	59
<i>" " Section 629—Review—Second application for.—A second application for review is in effect an application to review an order passed on an application for review, and cannot therefore, under the last clause of Section 629, Act X of 1877, be entertained,</i> ...	6
<i>Common land—Tenancy Act, XXVIII of 1868, Section 9—Occupancy rights.—Section 9 of Act XXVIII of 1868 which enacts that a tenant cannot acquire rights of occupancy in common land under Chapter II of the Act, does not apply to cases where occupancy rights in common land have been acknowledged prior to the promulgation of that Act.</i>	
<i>Civil Judgment No. 30, Punjab Record for 1872, distinguished,</i>	31
<i>Confession by Agent—Decree on—See "Agent, authority of, to confess judgment."</i>	
<i>" " Decree on.—See "Decree on confession."</i>	
<i>Conjugal rights—Restitution of—Mahammadan Law—Adultery—Violation of marriage Contract.—In a suit for restitution of conjugal rights, it was pleaded (among other grounds) that plaintiff had lost his rights by reason of his adultery. Held that the fact of plaintiff having had sexual intercourse with prostitutes during the absence of his wife, she persistently for years having refused to live with him, was not so gross a violation of the marriage contract as to disentitle plaintiff to the custody of his wife,</i> ...	41
<i>Consent of co-sharers. Sale of vacant site occupied by proprietor for many years—Custom,</i> ...	24
<i>Consideration—Admission as to receipt of, before Registering officer.—See "Admission" and "Registration."</i>	
<i>Contract Act IX of 1872, Sections 10 and 23.—Agreement by Pleader for extra remuneration contingent on success.—Public policy.—Held by the Full Bench, that the effect of Section 39 of Act XX of 1865 is not to restrict the power of a pleader and client to settle by private agreement the remuneration to be paid to the former by the latter for professional services, but to leave them at full liberty to make such agreements, subject to the provisions of the general law of Contract.</i>	

The validity of such an agreement when called in question must be determined by applying the tests prescribed in the Contract Act, 1872.

Held, further by the Full Bench, that an agreement between a pleader and client regarding the remuneration for professional services of the former in conducting a legal proceeding for his client in Court, which stipulates for payment to the pleader, in addition to a sum to be paid in advance, of a further sum conditional upon success, is not void as being opposed to public policy, merely because it contains such a stipulation.

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Circumstances affecting the validity of such agreements considered.

The decision of the majority of the Full Bench in Civil Judgment No. 26, *Punjab Record* for 1874, regarding the operation of Section 39, Act XX of 1865, dissented from, ...

Contract Act IX of 1872, Sections 76 and 108—"Goods."—*Stolen currency note.—Bond fide holder.*—R. L., of Rohtak was robbed of a currency note by one N., who brought it to Dehli and with the assistance of H. got it cashed by R. N., who passed it for full consideration to M. D.

The Rohtak police traced the note to M. D., seized half of it and gave it in as evidence in the Criminal case against the thief N. the latter was convicted and by order of the Magistrate the half note was handed over to R. L., who subsequently sued before the Judicial Assistant of Rohtak and obtained a decree (*ex parte*) against M. D., for the other half note, or (alternatively) for Rs. 100.

In a suit by M. D., against R. N., from whom he received the note, to recover its value, *held* that M. D. was not entitled to recover, he having received full consideration from R. N.

The title of the *bond fide* holder, for consideration, of a currency note, is not defective by reason of a defect in the title of a previous holder.

Held further, that the fact of M. D. having been deprived of his note by a decree of the Judicial Assistant of Rohtak did not give him a cause of action against R. N., from whom he obtained it, ...

Sections 134, 137 and 139—Discharge of sureties—Liability of creditor to take legal proceedings against principal debtor—English Bankruptcy Act 1869 (32 & 33 Vict. Chapter 71).—Plaintiff sued on a bond, the cause of action on when accrued on 15th September 1868, and relied on a series of letters from defendant extending from 14th June 1870 to 23rd June 1872 as acknowledgments. The claim as against the principal debtor was barred.

The letters generally complained of the way in which Dr. Menzies, the principal debtor, and his son—who was one of the sureties, were evading their obligations, and urging on the Bank (plaintiff) the necessity of taking vigorous measures against them, so as to protect the writer, Dr. Morice (defendant), and the third surety, Captain Price, from the loss which otherwise they would suffer. Dr. Morice wrote throughout as a surety still liable for the debt.

In one letter dated 16th June 1871 Dr. Morice wrote as follows:—

"As Dr. Menzies has behaved in a most dishonest and disgraceful manner, I think he ought to suffer and not the securities,.....
"I trust the Bank will in fairness to the securities take all steps
"in their power to make Dr. Menzies pay his own debts.....
"I will agree to anything it proposes."

The letters of 21st and 23rd June 1872, contained the following:—

"I have just heard from Captain Price, and I think we can make arrangements regarding Dr. Menzies' debt to the Bank provid-

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ed the Bank is not too hard on us. I shall be glad to hear what the Bank propose.".....
 "It is quite impossible for us to pay the whole of Dr. Menzies' debt including interest, down, but we might come to some arrangement that would be fair to the Bank without being utterly ruinous to ourselves."

On or about 8th June 1870, Dr. Menzies fled from India, without giving any intimation to the Bank. After some correspondence with the sureties, and after writing to England to Dr. Menzies threatening proceedings, the Bank by a letter dated 22nd November 1870, put the matter in the hands of their London Solicitor Mr. Lattey.

If turned out that Dr. Menzies had gone to live in Guernsey, and the Attorney General of that island, who was consulted, gave an opinion to the effect that proceedings could not be taken in the Courts there until Dr. Menzies had resided there a year and a day. Before the time for proceeding arrived, Dr. Menzies fled to some place on the Continent, and when next the Bank got a distinct clue to his whereabouts he was at Buenos Ayres in South America.

Then followed correspondence in which the possibility of following him there was discussed, but the difficulties were great. On 23rd August 1872 Mr. Lattey advised the Bank to abandon the idea of instituting proceedings in Buenos Ayres. He wrote—"I am free to confess that such steps if taken would, in my opinion, be accompanied with considerable risk as to costs, and more than a strong chance of a futile result." On this advice the Bank acted.

On the 8th June 1871 Dr. Menzies was declared a bankrupt in England, and the Bank accepted a dividend under his bankruptcy in England.

On 27th April 1872, and again on 23rd June 1872, Dr. Morice, by letter, urged the Bank to institute proceedings against Dr. Menzies, and said he and his co-surety Captain Price were willing to pay expenses.

To the second letter the Secretary to the Bank replied on 28th June 1872—"I note that you are willing to pay the expenses of prosecuting Dr. Menzies at Buenos Ayres. I am now taking steps to have this done, but it must necessarily be a good many months before the result can be known."

Held, that the Bank was not bound to take legal proceedings against Dr. Menzies, but that such a duty was cast on the Bank by its correspondence with Dr. Morice, and that it had done all that a prudent man would do under the circumstances, and properly discharged the duty it had taken upon itself by its Secretary's letter of 28th June 1872; and further, that even if the Bank by the letter of 28th June 1872 had undertaken absolutely, and at all risks, to proceed against Dr. Menzies, still its neglect to do so would not release Dr. Morice, unless it could be shown that Dr. Menzies was then solvent and had since become insolvent.

Held, further, that the sureties were not discharged by reason of the Bank allowing the claim against Dr. Menzies to become barred

The references are to the Nos. given to the cases in the "Record."

- by lapse of time, as the law of limitation did not discharge the principal or extinguish the debt, but merely barred the remedy, ... No. 2
- Contract Act IX of 1872, Section 145—Principal and Surety—Money rightfully paid—Payment by surety of debt barred as against principal.*—Plaintiff, a surety, sued his principal to recover the amount paid by him under a decree obtained by the creditor against him as surety. In that suit the principal debtor was also sued, and the decree in the first court was against both. The principal appealed, and the decree against him was reversed on the merits. The surety did not appeal, but acquiesced in the decree against himself. The action of the creditor as against the principal debtor was barred by limitation, and the action against the surety would also have been barred, but for the fact that he had, before expiry of the period of limitation, struck a balance of the account against the principal, and signed an acknowledgment that the balance was due.
- Held* under the circumstances that plaintiff was not entitled to recover from his principal the amount which he had been compelled to pay under the decree against him.
- A moral obligation to pay a debt barred by limitation subsists, though the legal means of recovering it have been lost, but a surety paying such a debt does not pay "rightfully" within the meaning of Sec. 145 of the Contract Act IX of 1872, and is therefore not entitled to recover from his principal, ... 30
- " *Section 265—Suit to wind up partnership-business—Jurisdiction—District Court—Extra Assistant Commissioner's Court.*—Plaintiffs, representatives of a deceased partner in a business carried on in Calcutta, instituted a suit for an account in the Court of the Extra Assistant Commissioner at Amritsar. *Held* that the suit was one to have the partnership-business wound up, and fell within the terms of Section 265 of the Contract Act, IX of 1872.
- Held* further, that the Extra Assistant Commissioner had no jurisdiction, such a suit being triable only by a Court not inferior to the Court of a District Judge; and that, as the principal place of business of the firm was in Calcutta, the Amritsar Courts had no jurisdiction, ... 35
- Court Fees' Act VII of 1870, Section 7. Clauses V (b) and (d), and Section 12, Clause I—Suit for possession of a share in a joint Khata—Valuation—Appeal.*—Plaintiff sued for possession of 214 kanals 8 marlas of land on the allegation that defendants sold it to him for Rs. 1,500, give him possession and subsequently dispossessed him. The sale deed conveyed to defendant no specific land, but seven-fifteenths of Khata No. 409, which was a joint Khata, comprising 460 kanals 10 marlas of land. The Courts below rejected the plaint on defendant refusing to file additional stamps as on a suit valued in accordance with Section 7, Clause V (d) of the Court Fees' Act 1870. Plaintiff appealed, insisting on his right to value the suit at five times the jama under Section 7, Clause V (b), when a preliminary obligation was taken that the appeal was barred by Section 12, Clause I.
- Held* by the Chief Court that the appeal was not barred, as the question was not merely one relating to valuation for the purpose of

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determining the amount of fee chargeable on the plaint, but whether a particular article of Clause V of Section 7 applied to the suit.	
<i>Held</i> further, that the defendants' prayer really was for possession jointly with the defendants of Khata No. 409, with an interest therein to the extent of seven-fifteenths, and that the whole Khata being part of an estate paying annual revenue to Government and recorded in the Collector's register as separately assessed with revenue, within the meaning of Clause V (b) the value of the suit must be deemed to be five times the revenue payable on the Khata,	67
<i>Currency note—Stolen.</i> —See " <i>Stolen Currency note.</i> "	
<i>Custody of wife—Agreement at marriage not to remove wife from parents' house—Public policy.</i> —Plaintiff on his marriage executed an agreement binding himself never to take his wife away from her parents' house or town, under a penalty of freeing his wife from the marriage tie. <i>Held</i> that the agreement was contrary to public policy, and therefore, was no answer in a suit by the plaintiff for the custody of his wife,	20
<i>Custom—Adoption—Bujwa Rajputs of Sialkot District—Construction of rawaj-i-am—Near relative.</i> — <i>B. S.</i> , whose father <i>D. S.</i> had been adopted by a collateral <i>G.</i> , was adopted by <i>S. D.</i> own brother of <i>D. S.</i> The <i>rawaj-i-am</i> of the District ran to the effect that "among Bujwa Rajputs a proprietor may, having regard to near relationship, adopt a son from collaterals descended from the same common ancestor, but may not adopt a person from another caste, or a daughters' son, or a sister's son, or a son-in-law."	
It was also found after a local enquiry that no custom existed which would render the adoption invalid.	
<i>Held</i> that the proper construction of the <i>rawaj-i-am</i> was not that the nearest relative must be adopted, so as to invalidate the adoption of a relative, otherwise eligible. The rule of <i>factum valet</i> would apply; and as no other custom existed rendering the adoption invalid, it must be upheld,	47
" " <i>Daughter's son—Khatris—Kakri gôt—Ferozpur District.</i> —Found that, by the custom of khatris of the Kakri gôt, in Mouzah Salibvah, Tahsil Mogah, Zillah Ferozpur; the adoption of a daughter's son is valid.	
Adoption of a brother's daughter's son accordingly upheld,	72
" " <i>Sister's grandson—Arroras of Lahore.</i> —By the custom of Arroras of Lahore, the adoption of a sister's grandson is valid,	77
" <i>Alienation—Ancestral house property—Khatris of Jullundhur.</i> —Found that no custom existed restraining the alienation of ancestral house property by Khatris of the town of Jullundur at the instance of possible reversioners, related in the fifth degree from the alienor,	51
" <i>Childless village proprietor—Gift of entire estate by, in presence of collaterals.</i> —Found that, by the custom of Mouza Chak Chuhar in the Gujrat district, a childless village proprietor has power to make a gift of his land to whom he pleases,	62
" <i>Chowdriat dues. Nowshera bazaar.</i> —Plaintiff sued for a declaration of his right to one-fourth seer per maund on all foreign grain weighed within the Nowshera bazaar in lieu of service as chowdry, according	

The references are to the Nos. given to the cases in the "Record."

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to ancient custom. <i>Found</i> by the Full Bench that no such custom was proved; that it was only with the consent of the shopkeepers, defendants, that plaintiff, as chowdry, could levy the fees; and that, unless with such consent, or as remuneration for services actually rendered at the request of parties, plaintiff was not entitled to levy the fees, ...	45
<i>Custom—Gift to daughter's son—Gujar tribe of Gujrat District.</i> —The <i>wajib-ul-arz</i> allowed gifts of land by a proprietor to his daughter and son-in-law. <i>Held</i> that a gift to the daughter's son was within the spirit of the <i>wajib-ul-arz</i> , and that, not being opposed to custom, it was valid, ...	46
<i>Inheritance—Mahomedan Law—Sons and Grandsons—Right of representation.</i> —S. A., died leaving him surviving K. A., a son, and two grandsons S. and M. the sons of A. A., who predeceased his father S. A. In a suit by K. A. claiming, under Mahomedan Law, the entire estate of S. A. deceased.	
<i>Found</i> that custom recognized the right of representation, and therefore, that the grandsons were not excluded from inheriting, ...	60
<i>Khana damad (resident son-in-law)—Succession—Gujrat.</i> — <i>Found</i> by the custom of Parganah Gujrat, that a son-in-law, who has been brought up and married in his father-in-law's house, has lived there continuously to his death, and been joint in cultivation with him, is entitled to succeed to his land with the consent of the widow, and in accordance with the expressed desire of the deceased proprietor, ...	56
<i>Khana damad, or resident son-in-law—Ancestral property of natural family, right to claim in.</i> — <i>Held</i> , no custom to the contrary being proved, that a <i>Khana damad</i> (resident son-in-law) or his descendants are not precluded from claiming a share in the ancestral property of their natural family, merely by reason of the fact that such <i>Khana damad</i> had succeeded to the estate of his father-in-law, ...	68
<i>Muhammādans—Adoption—Child brought up from infancy—Gift to—appointment of heir—Inheritance—Hoshiarpur District.</i> —N. M., was brought up from his infancy by K. B., lived with him and was married by him. In 1872 K. B. executed a deed of adoption, in which he declared that he regarded N. M. as his own begotten son and intended that he should inherit all his property. In 1873 K. B. caused mutation of names to be effected. It did not appear that N. M. was put in possession, but on the other hand there was no evidence that between 1873 and his death K. B. revoked his declaration that N. M. was his adopted son and was to be his heir.— <i>Held</i> that, under the circumstances, N. M. was entitled by custom to inherit the property of K. B., ...	70
<i>Jats of Nawashahr Tahsil—Jullundur District.</i> — <i>Quasi adoption—Inheritance—Adoption of sister's son.</i> —S., a Muhammadan Jat of the Nawashahr Tahsil, appointed J. his <i>quasi</i> adopted son to be his heir. <i>Found</i> , that custom recognized J's right under the circumstances to inherit the property of S., ...	80
<i>Sheiks—Childless village proprietor—Gift to daughter's son of ancestral property.</i> — <i>Found</i> that custom precluded a childless village proprietor from making a gift of his ancestral property to his daughter's son, in the presence of nephews, ...	39

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<i>Customs—Muhamadans—Weavers of Jalandhar—Daughters—Succession of Brothers' sons and grandsons—Ancestral house property.</i> —Found that, by the custom among weavers of Jalandhar, in the presence of daughters, brothers' sons and grandsons are not entitled to succeed to ancestral house property, ...	69
„ <i>Pre-emption—Mortgage—Act VI of 1872—Sections 7 and 10.</i> —Found by the custom of Mouza Majri, Tahsil and Zilla Umballa, that the right of pre-emption extends to mortgages; and held, following No. 53, Punjab Record 1877, that effect must be given to such custom under Section 7, Act IV of 1872, notwithstanding Section 10 of that Act, ...	49
„ <i>Raiens of Hoshiarpur district—Village proprietor without male issue—Gift to daughter's son.</i> —Found that no custom existed amongst the Raiens of the Hoshiarpur district which precluded a village proprietor, without male issue, from making a gift of all his property to daughter's son, ...	37
„ <i>Village Site—Abadi—Sale of vacant site occupied by proprietor for many years—Consent of co-sharers.</i> —Where the <i>abadi</i> was recorded in the <i>wajib-ul-arz</i> as the common property of the village proprietors, held (no special custom being proved) that the fact of one of the proprietors having held a vacant site in the <i>abadi</i> gave him no right to sell it to one who was not a member of the village community, without the consent of the co-sharers, ...	24
D.	
<i>Daughters—Succession of.</i> —See " <i>Inheritance.</i> "	
„ <i>son's—Adoption—Khatris—Kakri gôt—Ferozpur District.</i> —Found that, by the custom of Khatris of the Kakri gôt, in Mouzah Salibvah, Tahsil Mogah, Zillah Ferozepore, the adoption of a daughter's son is valid.	
„ <i>Adoption of a brother's daughter's son accordingly upheld, ...</i>	72
„ <i>son—Gift to—Custom—Raiens of Hoshiarpur district—Village proprietor without male issue.</i> —Found that no custom existed amongst the Raiens of the Hoshiarpur district which precluded a village proprietor, without male issue, from making a gift of all his property to his daughter's son, ...	37
„ „ <i>by childless village proprietor—Mahomedan Sheikhs.</i> —Found that custom precluded a childless village proprietor from making a gift of his ancestral property to his daughter's son, in the presence of nephews, ...	39
„ „ <i>Custom—Gujar tribe of Gujrat District.</i> —The <i>Wajib-ul-arz</i> allowed gifts of land by a proprietor to his daughter and son-in-law. Held that a gift to the daughter's son was within the spirit of the <i>wajib-ul-arz</i> , and that, not being opposed to custom, it was valid, ...	46
<i>Debts barred as against principal—Discharge of—by surety.</i> —See " <i>Principal and surety.</i> "	
„ <i>contracted for immoral purposes.—Liability of ancestral and acquired property for payment of.</i> —See " <i>Hindu Law</i> " and " <i>Ancestral and acquired property.</i> "	

The references are to the Nos. given to the cases in the "Record."

No.

Decree on confession—Review—Civil Procedure Code (Act VIII of 1859) Sections 98 and 376—Agent, authority of, to confess judgment—Circumstances under which principal is entitled to relief.—On 24th February 1877, plaintiff instituted a suit against defendant to establish his right to the office of Diwan of the khangah of Miran Salib at Thuska, and to share in the management of the institution. Defendant was summoned for 20th March 1877 for settlement of issues. On 7th March 1877, before the summons was served, defendant's general agent or muktar, Mahamda Shah, appeared and confessed judgment, upon which a decree was passed in favour of plaintiff.

On 29th March 1877 defendant, through his pleader, applied for review of judgment on the grounds that, 1st, the decree on confession of judgment had been passed before the date fixed for hearing, and 2nd, that the confession of judgment had been made without defendant's consent or authority. The application was rejected on the ground that Mahamda Shah's power of attorney gave him power to confess judgment and bind defendant.

Held by Smyth, J., following No. 37, *Punjab Record*, 1877, that defendant was entitled to relief, unless it could be shown that the agent was in point of fact expressly or impliedly authorized to make the confession of judgment sought to be impeached.

Held by Plowden, J., that even if the power of attorney was sufficient in itself, and without any further instrument of authorization to confer upon the agent authority to confess judgment generally, the defendant would be entitled to relief if he could show that the general authority had, in the particular case, been exercised in such a manner or with such results that it would be unjust to hold him bound by his agent's act.

Per Plowden, J. Under the Code of Civil Procedure, a decree by consent may be set aside by review if the attainment of the ends of justice require it, and, therefore, that if it appeared that the confession of judgment had been made by the agent under such circumstances that it operated as a fraud upon the defendant, or was made in error or acted as a surprise upon him, he would be *prima facie* entitled to the relief sought, ...

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„ —*Payments in satisfaction of—made out of Court, but not certified to the Court.*—See "*Execution of Decree.*"

„ *providing that execution shall be stayed for a certain period—Date from which limitation begins to run.*—See "*Limitation—Act IX of 1871, Schedule II No. 167.*"

Distribution of assets—See "*Priority,*" and "*Succession Act X of 1865, Section 282.*"

District Court—Jurisdiction of—to try a suit to wind up a partnership from the principal place of business of which was in Calcutta.—See "*Jurisdiction.*"

Drain—Suit to close a—Public thoroughfare—Street—Nuisance.—Plaintiff sued to compel defendant to close a drain through which the water from his mosque flowed on to the public street in front of plaintiff's premises. *Held* that the suit was not maintainable without proof of special damage, differing not merely in degree but in kind from that sustained by the rest of the public, ...

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The references are to the Nos. given to the cases in the "Record."

No.

E.

Easement—Limitation—Act IX of 1871, Section 27—Right of way.—In a suit for an easement or right of way, the question for decision is whether the way has been openly and peaceably used and as of right without interruption for a period of 20 years ending within two years next before the institution of the suit. (Section 27 Act IX of 1871), where it was found that the way was not used for more than ten years at most, *held* that the plaintiff's claim to a right of way failed,

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Elder brother acting on behalf of younger brother—Effect of acknowledgment of mortgage by—See "*Acknowledgment of mortgage.*"

Enhancement of rent.—See "*Rent—Enhancement of.*"

Estoppel—Hindu Law—Ancestral and acquired property—Liability of, for father's debts contracted for immoral purposes—Suit against son as representative—Omission to plead that debts were contracted for immoral purposes.—In October 1875 the present defendants sued the present plaintiff and his brother as the legal representatives of the deceased debtor, Sher Sing, their father. They both admitted the debt, but the present plaintiff pleaded that he had no assets, and that he had been separated 20 years before from his father. The Court granted a decree against the brothers jointly, as representatives, recoverable from the property of Sher Sing, deceased, in their hands.

In execution of that decree a house in the possession of the present plaintiff was attached. He applied for its release on the ground that it had been in his possession for 30 years and was ancestral property, and that the debt sued for had been contracted for an immoral purpose. His application having been rejected he instituted the present suit.

Held that, by Hindu law, both ancestral and acquired estates in the hands of a son are upon an equal footing, and not liable for the father's debts if contracted for an immoral purpose; and, therefore, that as the plea that the debts had been contracted for an immoral purpose would have been a complete answer to the former suit, and the plaintiff had omitted to put it forward, he was now estopped from doing so,

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Estoppel—Sanction to Settlement—Ratification of acts of Settlement officers—Board of Administration Circular 8 of 11th February 1852—Powers of Settlement officers—Grant of zamindari in Khana Khalee or Government estates.—By an order of the Settlement officer of the Ambalah district dated 24th March 1852, one D, was granted the zamindari of Raiyanwala, and his name was directed to be entered in the proprietary column in the Settlement papers. In pursuance of this order the subordinate Settlement officers recorded D. as proprietor of each field or plot in the village, including two plots now in dispute. The Settlement officer was acting under the authority of Revenue Circular No. 8 dated 11th February 1852, of the Board of Administration, which authorized Settlement officers to grant the zamindari or proprietary rights in *Khana Khalee* or Government estates to private persons.

It did not appear that the Settlement officer had his attention drawn to the fact that, although the entire village of Raiyanwala

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belonged to Government, there were portions of it which were in possession of the Canal department, and part of it occupied by the bed of the Western Jamna Canal. All such portions, including even the bed of the canal, were recorded as the property of D. in pursuance of the above order.

It was found that the two plots in dispute formed part of the land then in possession of the Canal department, and that they had been in possession prior to the grant to D. and had continued in possession up to the present date, and had all along used the plots for canal purposes. In 1860 certain letters passed between D.'s representatives and the Commissioner and Deputy Commissioner of Umballa. The Deputy Commissioner heard that negotiations were going on for the sale of D's. estate. He pointed out that they would not be allowed to sell the farms of certain villages which had been held by D. and the terms of which had not then expired, as these were not transferable; and that as regards the villages held by D. in proprietary right, they must sell to the resident cultivators, who had the right of pre-emption. The cultivators were unable to purchase, and eventually D's. representatives sold the village of Raiyanwala to plaintiffs, on which *dakhil kharij* or mutation of names took place.

Held by FITZPATRICK, J., that the grant of the zamindari did not include two plots in dispute, which were looked upon as part of the canal.

Per SMYTH, J., that the Settlement officer exceeded his authority in granting the zamindari without reserving to Government the plots in dispute, as the Circular of the Board of Administration referred only to lands which were used for agricultural purposes, or which might by reclamation or otherwise be used for such purposes, and did not include lands held by Government for public purposes.

Per Curiam.—That the Government in sanctioning the Settlement of the Umballa district did not ratify all the acts of the Settlement officer, including the grant of the entire village of Raiyanwala; and that plaintiffs had failed to show any acts or admissions on the part of the officers of Government since the date of the grant which would have the effect of estopping Government from contesting plaintiff's claim, ...

Estoppel—Waiver of right by first pre-emptor in favour of stranger—Subsequent assertion of right against second pre-emptor.—*Held* that a pre-emptor, who has once waived his right to accept or insist upon an offer of sale, cannot afterwards come forward and re-assert his right against another person who has claimed pre-emption in the same sale, and obtained a decree transferring the property to himself, ...

Evidence Act I of 1872, Section 65—Public document—Secondary evidence other than certified copy—Admissibility of—when document is lost.—*Held* that secondary evidence of a lost public document, other than a certified copy, is admissible upon proof of loss or destruction of the original and further proof that no certified copy of the original is available to the party seeking to prove the contents of the original.

Held further, that so long as the original is in existence, no secondary evidence other than a certified copy is admissible, ...

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The references are to the Nos. given to the cases in the "Record."

- Evidence Act (I of 1872) Section 91—Registration Act (VIII of 1871) Sections 17 and 49—Unregistered mortgage accompanied by possession—Subsequent registered mortgage—Admissibility of parol evidence.*—C. S. mortgaged his land to D. S. by deed dated 26th July 1873 for Rs. 620. The deed, however, was not registered as required by Section 17 of Act VIII of 1871. C. S. again mortgaged the land to one C. by registered deed dated 13th July 1874 for Rs. 700. In a suit by C. against C. S. and D. S. for possession of the mortgaged lands:—*Held* that the unregistered mortgage to D. S. whether accompanied by possession or not was invalid as against the registered mortgage to C., and that D. S. was precluded by Section 49 Act VIII of 1871 from proving that the land was mortgaged to him under the deed of 1873, and was further precluded by Section 91 of the Evidence Act, 1872, from proving it by oral evidence, ...
- Execution of decree—Informality in process of, under section 239, Act VIII of 1859,—Effect of.*—On 28th April 1876 C. H. and W. obtained an *ex-parte* decree against J. K., in execution of which certain shops were attached on 29th June 1876. On 2nd August 1876 J. K. applied under Section 119, Act VIII of 1859 to have the *ex-parte* decree set aside. The process of execution issued under Section 239, Act VIII of 1859, was informal, because (a) no copy of the prohibitory order was attached to the door of the Court, or other conspicuous part of the Court-house, and (b) the order was not read aloud in any place on or adjacent to the shops sought to be attached.
- Held* by PLOWDEN and ELSMIE, JJ., that no legal process of execution was executed under Section 239 within 30 days of the application made by J. K. on 2nd August 1876, and therefore, that his application was within time.
- Per* FITZPATRICK and PLOWDEN, JJ.—A Court has no discretion to set aside an *ex-parte* decree on application made more than 30 days after process for enforcing the decree has been executed, even though it appear that the defendant had, as a matter of fact, not known of the execution till within 30 days before he made his application.
- A party insisting upon the provisions of a severe and stringent law, like that relating to *ex-parte* decisions, is bound to see that every formality is strictly complied with; where this is not done a Court is bound to hold, for the purposes of Section 119 Act VIII of 1859, that no process has been executed, ...
- Payments in satisfaction of, made out of Court, but not certified to the Court—Civil Procedure Code (Act VIII of 1859) Section 206.*—D. obtained a decree against K. and S. A. for possession of certain mortgaged land, subject to the condition that K. and S. A. were to continue in cultivation thereof for three years, paying D. the proprietor's share of the produce, out of which D. was to pay the Government revenue, and apply the surplus (if any) to paying off the principal debt, and in the event of the principal debt not being paid off, D was to obtain cultivating possession. At the end of three years, D applied for possession under the decree, alleging non-receipt of any payments under it, while K. and S. A. alleged payments in

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full satisfaction of the principal debt. *Held* that the Court executing the decree was precluded by Section 206 Act VIII of 1859 from recognizing the payments alleged to have been made out of Court, and which were not certified to the Court.

Semble, that even if it was intended that the payments under the decree obtained by D. should be made out of Court, K. and S. A. were not relieved from the duty of seeing that such payments were certified to the Court by D, ...

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*Execution of decree—Sale of moveable property in—Title acquired by purchaser—Property wrongly attached and sold—Remedies of real owner of goods—Civil Procedure Code Act X of 1877, Sections 266 and 287.—*Where moveable property belonging to A was attached and sold in execution of a decree against B, *held* that A was entitled to sue the auction-purchaser for the restoration of the specific moveable or for its value.

The purchaser of moveable property at an execution sale does not take an absolutely unimpeachable title to the property, and the fact that the real owner may have a remedy by a suit for damages against the execution creditor for causing the property to be attached and sold does not debar him from bringing a suit to recover the property itself from the auction-purchaser, ...

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*Ex-parte decree—Act VIII of 1859, Sections 119 and 239—Application to set aside, made after time—Discretion of Court to admit—Informality in process of execution under Section 239, effect of.—*On 28th April 1876 C. H. and W. obtained an *ex-parte* decree against J. K., in execution of which certain shops were attached on 29th June 1876. On 2nd August 1876 J. K. applied under Section 119, Act VIII of 1859 to have the *ex-parte* decree set aside. The process of execution issued under Section 239, Act VIII of 1859, was informal, because (a) no copy of the prohibitory order was attached to the door of the Court, or other conspicuous part of the Court-house, and (b) the order was not read aloud in any place on or adjacent to the shops sought to be attached.

Held by PLOWDEN AND ELSMIE, JJ., that no legal process of execution was executed under Section 239 within 30 days of the application made by J. K. on 2nd August 1876, and therefore, that his application was within time.

Per FITZPATRICK AND PLOWDEN, JJ.—A Court has no discretion to set aside an *ex-parte* decree on application made more than 30 days after process for enforcing the decree has been executed, even though it appear that the defendant had, as a matter of fact, not known of the execution till within 30 days before he made his application.

A party insisting upon the provisions of a severe and stringent law, like that relating to *ex-parte* decisions, is bound to see that every formality is strictly complied with; where this is not done a Court is bound to hold, for the purposes of Section 119 Act VIII of 1859, that no process has been executed, ...

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Extra Assistant Commissioner's Court—Jurisdiction of, to try a suit to wind up a partnership business.—See "Jurisdiction."

The references are to the Nos. given to the cases in the "Record."

G.

General hypothecation of property—Mortgage.—A bond which does not specify the property alleged to be hypothecated, but merely engages that the debt may be realized from the moveable and immoveable property of the debtor, *held* not to operate as a mortgage, ...

Gift of entire estate by childless village proprietor, in presence of collaterals.—See "*Village proprietor—Childless.*"

to child brought up from infancy.—See "*Child brought up from infancy—Gift to.*"

Gift to daughter's son.—See "*Daughter's son.*"

Gujar tribe, of Gujrat District—Custom—Gift to daughter's son.—The *wajib-ul-arz* allowed gifts of land by a proprietor to his daughter and son-in-law. *Held* that a gift to the daughter's son was within the spirit of the *wajib-ul-arz*, and that, not being opposed to custom, it was valid, ...

H.

Hindu Law—Adoption—Relinquishment of status—Disinherison.—*Held* that, according to Hindu law an adopted son cannot relinquish his status, nor be disinherited by his adoptive father, ...

" *Ancestral and acquired property—Liability of, for father's debts contracted for immoral purposes—Suit against son as representative—Omission to plead that debts were contracted for immoral purposes—Estoppel.*—In October 1875 the present defendants sued the present plaintiff and his brother as the legal representatives of the deceased debtor, Sher Sing, their father. They both admitted the debt, but the present plaintiff pleaded that he had no assets, and that he had been separated 20 years before from his father. The Court granted a decree against the brothers jointly, as representatives, recoverable from the property of Sher Sing, deceased, in their hands.

In execution of that decree, a house in the possession of the present plaintiff was attached. He applied for its release on the ground that it had been in his possession for 30 years and was ancestral property, and that the debt sued for had been contracted for an immoral purpose. His application having been rejected he instituted the present suit.

Held that, by Hindu law, both ancestral and acquired estates in the hands of a son are upon an equal footing, and not liable for the father's debts if contracted for an immoral purpose; and, therefore, that as the plea that the debts had been contracted for an immoral purpose would have been a complete answer to the former suit, and the plaintiff had omitted to put it forward, he was now estopped from doing so, ...

" *Ancestral property—Liability for immoral debts of deceased father—Onus of proof.*—No inflexible general rule can be laid down, in a suit by a creditor against the son of a deceased Hindu, in order to declare ancestral property in the hands of the latter liable to sale in satisfaction of the debt sued upon, as to whether the plaintiff is bound to prove the nature of the debt, or the defendant.

Question discussed as to whom the onus would lie on under certain circumstances, ...

" *Widow.*—See "*Widow.*"

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The references are to the Nos. given to the cases in the "Record."

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I.

- Inheritance—Khana damad (resident son-in-law)—Custom—Gujrat.*—Found by the custom of Pargamah Gujrat, that a son-in-law, who has been brought up and married in his father-in-law's house, has lived there continuously to his death, and been joint in cultivation with him, is entitled to succeed to his land with the consent of the widow and in accordance with the expressed desire of the deceased proprietor, ... 56
- " *Khana damad, or resident son-in-law—Ancestral property of natural family, right to claim share in—Custom.*—*Held*, no custom to the contrary being proved, that a *Khana damad* (resident son-in-law) or his descendants are not precluded from claiming a share in the ancestral property of their natural family, merely by reason of the fact that such *Khana damad* had succeeded to the estate of his father-in-law, ... 68
- " *Mahomedan Law—Custom—Sons and Grandsons—Right of representation.*—S. A. died leaving him surviving K. A., a son, and two grandsons S. and M. the sons of A. A., who predeceased his father S. A. In a suit by K. A. claiming, under Mahomedan Law, the entire estate of S. A. deceased—
Found that custom recognized the right of representation, and therefore, that the grandsons were not excluded from inheriting, ... 60
- " *Mahomedans—Adoption—Child brought up from infancy—Gift to—Appointment of heir—Hoshiarpur District.*—N. M. was brought up from his infancy by K. B., lived with him and was married by him. In 1872 K. B., executed a deed of adoption in which he declared that he regarded N. M. as his own begotten son and intended that he should inherit all his property. In 1873 K. B. caused mutation of names to be effected. It did not appear that N. M. was put in possession, but on the other hand there was no evidence that between 1873 and his death K. B. revoked his declaration that N. M. was his adopted son and was to be his heir.—*Held* that, under the circumstances, N. M. was entitled by custom to inherit the property of K. B., ... 70
- " *Mahomedan—Weavers of Jalandhar—Daughters—Succession of—Brothers' sons and grandsons—Ancestral house property.*—Found that, by the custom among weavers of Jalandhar, in the presence of daughters, brothers' sons and grandsons are not entitled to succeed to ancestral house property, ... 69
- " *Quasi adopted son—Sister's son—Mahomedan Jats of Nawashahr Tahsil.*—S. a Mahomedan Jat of the Nawashahr Tahsil in the Jalandhar District, appointed J., his quasi adopted son, to be his heir. Found that custom recognized J.'s right under the circumstances to inherit the property of S., ... 80
- Insolvent, residence of.*—See "*Residence of Insolvent.*"
- " *Estates Court—Jurisdiction of.*—See "*Jurisdiction.*"
- Interest on claim secured by decree.*—*Succession Act (X) of 1865, Section 282—Distribution of assets—Priority—Mortgage lien.*—In July 1876 B. took out letters of administration of the estate of O'C. deceased. The largest creditor was B. himself, who held a lien on a life policy, which represented almost the entire assets of the deceased. B.'s claim was however under a decree which carried no interest. The

The references are to the Nos. given to the cases in the "Record."

	remaining creditors contended that B. was only entitled to his <i>pro rata</i> share under Section 282 Act X of 1865, and also that he was entitled to no interest on his claim.	
	<i>Held</i> that, the only claims to priority intended to be excluded by Section 282 were claims on the ground that the debt is a specialty debt and on other grounds <i>ejusdem generis</i> , and therefore, that B. was entitled to be first paid.	
	<i>Held</i> further, that B.'s claim being based upon a decree which did not provide for the payment of interest, he was not entitled to interest on it,	11
	J.	
Jagirdar—Mafidar—Tenancy Act (XXVIII of 1868) Section 5, Clause 4—Occupancy rights.—	<i>Held</i> that the term jagirdar includes a mafidar in Clause 4, Section 5 Act XXVIII of 1868,	12
Jats—Muhammadan, of Nawashahr Tahsil—Jalandhar District—Quasi adoption—Inheritance—Adoption of sister's son.—	S., a Muhammadan Jat of the Nawashahr Tahsil, appointed J., his quasi adopted son, to be his heir. Found, that custom recognized J.'s right under the circumstances to inherit the property of S.	80
Joint estate, partition of.—	See "Partition."	
„ immoveable property, owned by Hindus—Sale of share in—	Right of Muhammadan auction purchaser to partition.—R. obtained a decree against one M., a Hindu, in execution of which M.'s eighth share in a haveli was sold by public auction, and purchased by B. K. a Mahomedan. In a suit instituted by B. K. for partition, which was resisted by the remaining sharers in the haveli, who were Hindus, <i>held</i> that B. K. was entitled to partition and possession of the share purchased by him,	15
„ khata—	Suit by sharer in a, for recovery of particular lands.— <i>Held</i> that a sharer in a joint khata cannot maintain a suit against his co-sharer for the recovery of particular lands unless he can show either that he has been forcibly dispossessed of those lands, or that he made them over to his co-sharer under a contract by virtue of which he is entitled to have them restored to him,	21
Jurisdiction—Civil Court—Act XXXIII of 1871, Section 65, Clause 2—	Partition, Right of widow to—Joint estate.—Plaintiff, a widow, on the death of B., her husband's father, in 1872, was recorded as owner of a fifth share in the khata owned by B. and since then had received from defendants, the widow and sons of B. who were recorded as owners of the remaining four shares, a fifth share of the produce of the khata. Defendants having ceased to give plaintiff her fifth share of the produce, she instituted a suit for partition, which was contested by the defendants.	
	<i>Held</i> that as the right to partition was contested, the suit was not barred from the cognizance of the Civil Courts by Clause 2 Section 65 of Act XXXIII of 1871.	
	<i>Held</i> further, that plaintiff was entitled to partition,	22
„ Civil Procedure Code Section 622—	Limitation.— <i>Held</i> that the plea of limitation is not a question of jurisdiction within the meaning of Section 622, Act X of 1877,	59

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- Jurisdiction—District Court—Extra Assistant Commissioner's Court—Contract Act** No.
(IX of 1872,) Section 265—Suit to wind up a partnership business.
 Plaintiffs, representatives of a deceased partner in a business carried on in Calcutta, instituted a suit for an account in the Court of the Extra Assistant Commissioner at Amritsar. *Held* that the suit was one to have the partnership business wound up, and fell within the terms of Section 265 of the Contract Act, IX of 1872.
- Held* further, that the Extra Assistant Commissioner had no jurisdiction; such a suit being triable only by a Court not inferior to the Court of a District Judge; and that, as the principal place of business of the firm was in Calcutta, the Amritsar Courts had no jurisdiction, ... 35
- Insolvent Estates Court—Residence of Insolvent—Act IV of 1872, Sections 22 and 23.**—P. in order to take advantage of the Insolvent Estates Court at Lahore, rented a house in Lahore and resided in it from time to time for the express purpose of bringing himself within the jurisdiction of the Lahore Court. His ordinary place of residence before he presented his petition was and continued to be Umballa, where his wife and children were, and he had never carried on business at Lahore. *Held* that P's residence under the circumstances was not sufficient to give the Lahore Court jurisdiction. A debtor who does not reside or carry on business and who owes no debts within the local limits of the jurisdiction of the Insolvency Court to which he applies under Section 23 Act IV of 1872, is not entitled so to apply and does not become entitled by coming to reside temporarily within the jurisdiction with the sole and express object of making such application, ... 34
- Small Cause Court—Suit for rent of cultivated land.**—A suit for rent of cultivated land is excluded from the cognizance of a Court of Small Causes by the 4th proviso to Section 6 of Act XI of 1865, ... 44
- Act XI of 1865, Section 6—Moveable property—Title deeds—Suit for recovery of.*—Plaintiffs sued to recover the title deed of a house valued at Rs. 250, on the allegation that they had purchased the house through the defendant, who retained the purchase deed against their will. *Held* that the suit was one to recover moveable property, cognisable by a Court of Small Causes, and therefore, that no special appeal lay, ... 64
- Civil Procedure Code (Act X of 1877) Section 17, Explanation 1—Temporary dwelling place—Cause of action.**—S. D. was sued at Amritsar, where he temporarily resided, in respect of a cause of action which arose at Ajnala. *Held* that the Small Cause Court at Amritsar had no jurisdiction to entertain the suit.
- A temporary lodging only gives jurisdiction in respect of a cause of action arising at the place where the defendant has such a lodging, ... 75
- Valuation of pre-emption suit for purposes of.**—*Held*, by the Full Bench, that suits to enforce a right of pre-emption must as a rule be valued according to the market value of the property in respect of which the right is claimed, for the purpose of determining whether the suit falls within the pecuniary limits of the jurisdiction of a particular Court.

Civil judgment No. 62 Punjab Record, 1875, over-ruled.

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Held by the Division Bench, where the Tahsildar, having jurisdiction up to Rs. 300, entertained a suit for pre-emption in respect of property the market value of which was found to be at least Rs. 800, that the suit was beyond the jurisdiction of the Tahsildar, ...

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K.

Khana damad—(resident son-in-law) *Succession—Custom—Gujrat.*—Found by the custom of Pargauna Gujrat, that a son-in-law, who has been brought up and married in his father-in-law's house, has lived there continuously to his death, and been joint in cultivation with him, is entitled to succeed to his land with the consent of the widow and in accordance with the expressed desire of the deceased proprietor, ...

56

Ancestral property of natural family, right to claim share in—Custom.—*Held*, no custom to the contrary being proved, that a *khana damad* (resident son-in-law) or his descendants are not precluded from claiming a share in the ancestral property of their natural family, merely by reason of the fact that such *khana damad* had succeeded to the estate of his father-in-law, ...

68

Khana Khalee Estates—Grant of, in zamindari.—See "*Zamindari.*"

Khatris—Kakri gôt—Ferozpur District—Adoption—Daughter's son.—Found that, by the custom of Khatris of the Kakri gôt, in Mouzah Salibrah, Tahsil Mogah, Zillah Ferozpur, the adoption of a daughter's son is valid. Adoption of a brother's daughter's son accordingly upheld, ...

72

" of Jalandhar—Custom—Alienation—Ancestral house property.—Found that no custom existed restraining the alienation of ancestral house property by Khatris of the town of Jullundur at the instance of possible reversioners, related in the fifth degree from the alienor, ...

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L.

Land Revenue Act (XXXIII of) 1871, Section 65, Clause 2—Partition—Right of widow to—Joint estate—Jurisdiction—Civil Court.—Plaintiff, a widow, on the death of B, her husband's father, in 1872, was recorded as owner of a fifth share in the khata owned by B. and since then had received from defendants, the widow and sons of B, who were recorded as owners of the remaining four shares, a fifth share of the produce of the khata. Defendants having ceased to give plaintiff her fifth share of the produce, she instituted a suit for partition, which was contested by the defendants.

Held that as the right to partition was contested, the suit was not barred from the cognizance of the Civil Courts by Clause 2 Section 65 of Act XXXIII of 1871.

Held further, that plaintiff was entitled to partition, ...

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" Assignment of.—See "*Assignment of land revenue.*"

Legitimation—Muhammudan Law—Acknowledgment of son—Legal obstacle to marriage.—D. an undivorced woman left her husband K. who was still living, and went and lived continuously with one J. by whom she had three children.

Held, assuming there was a marriage between J. and D., that D. being undivorced, the marriage could not legally have taken place,

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- and that therefore, the offspring of the connection, even if the paternity was acknowledged by J., was incapable of being legitimated according to Muhammadan Law.
- Civil Judgment No. 13, *Punjab Record* 1875, distinguished, ... No. 71
- Legal proceedings—Liability of creditor to take, against principal debtor.—See "Principal and Surety."*
- Limitation—Act XIV of 1859, Sections 20 and 21—Execution of decree for money—Act VIII of 1859, Section 2.—A decree for money against the respondent having been obtained by the appellant on the 5th October 1866, the former made payments on account up to October 1869, on the 22nd of which month the appellant made a bonâ fide application to execute the same in respect of the unpaid balance. An order to that effect was refused by the Court which made the decree, but the respondent nevertheless made further payments on account.*
- On the 4th May 1871, a fresh application for execution was made, which was eventually again refused, the Chief Court of the Punjab holding that the decree having been obtained before the introduction of Act XIV of 1859 into the Punjab, the case must be governed by the provisions of Section 21 and not by Section 20 of that Act.
- Held*, by the Privy Council, that the application of 22nd October 1869, was a proceeding to enforce the decree within the meaning of Section 20, and having been taken within three years next preceding the application of 4th May 1871, this last application was not barred by Section 21.
- The prohibition laid down in Section 20 does not on the true construction of Section 21 apply to judgments in force at the time of passing the Act, ... 7
- Act IX of 1871, Section 15—Suit instituted in wrong Court—Proceedings before Revenue Officer.—Plaintiff applied in 1875, in respect to the land in suit, to the Deputy Commissioner as Revenue Officer, to be settled with, on which proceedings were taken which remained pending some time. The present suit for possession was admittedly barred, unless the period during which those proceedings were pending could be excluded under Section 15, Act IX of 1871, in computing the period of limitation.*
- Held* that the application of 1875 was not a suit founded upon the same right to sue as the present and in good faith instituted in a wrong Court, and, therefore, that the time during which the revenue proceedings were pending could not be excluded in computing the period of limitation, ... 52
- Section 20—Acknowledgment—Unqualified admission of subsisting liability.—Plaintiff sued on a bond, the cause of action on which accrued on 15th September 1868, and relied on a series of letters from defendant extending from 14th June 1870 to 23rd June 1872 as acknowledgments. The claim as against the principal debtor was barred.*
- The letters generally complained of the way in which Dr. Menzies, the principal debtor, and his son—who was one of the sureties, were evading their obligations, and urging on the Bank

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(plaintiff) the necessity of taking vigorous measures against them, so as to protect the writer, Dr. Morice (defendant), and the third surety, Captain Price, from the loss which otherwise they would suffer. Dr. Morice wrote throughout as a surety still liable for the debt.

In one letter dated 16th June 1871 Dr. Morice wrote as follows:—

"As Dr. Menzies has behaved in a most dishonest and disgraceful manner, I think he ought to suffer and not the securities,.....
"I trust the Bank will in fairness to the securities take all steps
"in their power to make Dr. Menzies pay his own debts.....
"I will agree to anything it proposes."

The letters of 21st and 23rd June 1872, contained the following:—

"I have just heard from Captain Price, and I think we can make arrangements regarding Dr. Menzies' debt to the Bank provided the Bank is not too hard on us. I shall be glad to hear what the Bank propose."
.....
....."It is quite impossible for us to pay the whole of Dr. Menzies' debt, including interest, down, but we might come to some arrangement that would be fair to the Bank without being utterly ruinous to ourselves."

On or about 8th June 1870, Dr. Menzies fled from India, without giving any intimation to the Bank. After some correspondence with the sureties, and after writing to England to Dr. Menzies threatening proceedings, the Bank by a letter dated 22nd November 1870, put the matter in the hands of their London Solicitor, Mr. Lattey.

It turned out that Dr. Menzies had gone to live in Guernsey, and the Attorney General of that island, who was consulted, gave an opinion to the effect that proceedings could not be taken in the Courts there until Dr. Menzies had resided there a year and a day. Before the time for proceeding arrived, Dr. Menzies fled to some place on the Continent, and when next the Bank got a distinct clue to his whereabouts he was at Buenos Ayres in South America.

Then followed correspondence in which the possibility of following him there was discussed, but the difficulties were great. On 23rd August 1872 Mr. Lattey advised the Bank to abandon the idea of instituting proceedings in Buenos Ayres. He wrote—"I am free to confess that such steps if taken would, in my opinion, be accompanied with considerable risk as to costs, and more than a strong chance of a futile result." On this advice the Bank acted.

On the 8th June 1871 Dr. Menzies was declared a bankrupt in England, and the Bank accepted a dividend under his bankruptcy in England.

On 27th April 1872, and again on 23rd June 1872, Dr. Morice, by letter, urged the Bank to institute proceedings against Dr. Menzies, and said he and his co-surety Captain Price were willing to pay expenses.

The references are to the Nos. given to the cases in the "Record."

No.

To the second letter the Secretary to the Bank replied on 28th June 1872—"I note that you are willing to pay the expenses of prosecuting Dr. Menzies at Buenos Ayres. I am now taking steps to have this done, but it must necessarily be a good many months before the result can be known."

Held that the letters contained an "unqualified admission of Dr. Morice's liability as 'still subsisting' within the meaning of Section 20, Act IX of 1871.

That the letter of 16th June 1871, being written within three years from the date on which the cause of action originally accrued, gave plaintiff a new period of limitation extending to 16th June 1874.

That the letters of 21st and 23rd June 1872 as acknowledgments extended the period over three years more, *i. e.* to the latter half of June 1875, and that the suit having been instituted on 8th June 1875 was within time, ...

Limitation Act IX of 1871, Section 20—Acknowledgment—Items barred by limitation

—A Court of first instance admitted in evidence an acknowledgment of a debt, which embraced items more than 3 years old, and consequently barred by limitation. *Held* that the Appellate Court was bound to enquire and decide whether only items not then barred by limitation were comprised in the balance struck, which was acknowledged by defendants to be due.

A written acknowledgment is only effectual under Section 20, Act IX of 1871 in giving a fresh period of limitation for a debt when it is signed before the expiration of the period prescribed for the debt, ...

Held, by the Full Bench, that a statement of account does not give a fresh starting point unless, 1st, it is in writing and satisfies the requirements of Section 20, Act IX of 1871, or, 2nd, amounts to a new contract between the parties, in which case it furnishes a new cause of action, ...

Section 27—Easement—Right of way.—In a suit for an easement or right of way, the question for decision is whether the way has been openly and peaceably used and as of right without interruption for a period of 20 years ending within two years next before the institution of the suit. (Section 27, Act IX of 1871). Where it was found that the way was not used for more than ten years at most, *held* that the plaintiff's claim to a right of way failed, ...

Schedule II, No. 10—Actual possession—Pre-emption.—On 3rd February 1876, B. R. purchased a shop from P. The shop was occupied by a tenant who accepted B. R. as his landlord on the same date, and agreed to pay the rent to him. No formal deed of sale was executed or registered till April 1876, owing to the vendor P. being in jail in execution of a decree, but the shop was verbally sold on 3rd February 1876, and a mortgage deed relating to the shop made over to the vendee B. R. In March 1877 the plaintiff instituted his suit for pre-emption.

Held that the sale was complete on 3rd February 1876, that B. R. took "actual possession" on that date within the meaning of

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The references are to the Nos. given to the cases in the "Record."

- Article 10, Schedule II, Act IX of 1871, and that, accordingly, the claim was barred by limitation, ... 29
- Limitation Act IX of 1871, Schedule II, No. 95—Suit to recover value of cattle wrongfully and fraudulently received by defendants.*—Plaintiff sued to recover the value of cattle wrongfully and fraudulently received by defendants, representing themselves as agents of S., and appropriated by them to their own use. *Held* that the suit was one coming under No. 95, Schedule II, Act IX of 1871, and that limitation began to run from the time when the alleged fraud became known to the plaintiff, ... 19
- " " " *No. 148—Acknowledgment of mortgage—Admission in deposition signed by mortgagee—Elder brother acting on behalf of younger brother.*—In a deposition in writing recorded in 1857 in a previous suit, and signed by the mortgagee K. M., he admitted the title of his mortgagor. To that suit R. co-mortgagee, was no party, but it was found that, in accordance with the practice in those days, K. M. as head of the family was acting for R. his younger brother. In a suit instituted in 1877, for redemption of mortgage, *held* that the admission in the deposition of 1857 signed by K. M. was a sufficient acknowledgment of the title of the mortgagor within the meaning of Article 148, Schedule II of the Limitation Act 1871, and that, as the admission of 1857 was made by K. M. on his own behalf, and as agent of his brother R., the claim was within limitation, ... 78
- " " " *Art. 167—Decree providing that execution shall be stayed for a certain period—Date from which limitation begins to run.*—On 4th November 1873, M. M. obtained a decree against R., but the decree provided that execution should be stayed until a cross-suit, lodged by R., should be decided. The suit lodged by R. was finally decided on 7th March 1876, and M. M. on 4th April 1877 (within 3 years from the date of the final decision in the cross-suit, but after 3 years from the date of the decree obtained by M. M.) applied for execution, ...
- Held* by Lindsay and Plowden, JJ., (Smyth, J. dissenting,) that when a decree is passed which by its terms is not to be executed till a future date, the date of the decree, and not the date when it becomes enforceable is to be taken in computing the period of limitation under Clause I, Article 167, Schedule II, Act IX of 1871. And, therefore, that the application of 4th April 1877 was barred.
- Per* Smyth, J., *contra.*—In the case of a decree which by its terms is not to be executed till a future date, "the date of the decree," in the sense in which those words are used in Clause I, Article 167, should be taken to be the date on which the decree becomes enforceable, and not the date on which the decree was passed, ... 43
- " " *Jurisdiction—Civil Procedure Code, Section 622—Held* that the plea of limitation is not a question of jurisdiction within the meaning of Section 622, Act X of 1877, ... 59
- " " *Plaint filed by recognized agent without power of attorney—Acceptance of plaint by Court—Act VIII of 1859, Section 17—Punjab Government Notification No. 1225, dated 26th September 1866.*—On 30th January

The references are to the Nos. given to the cases in the "Record."

No.

1877, (before the period of limitation had expired) plaintiff instituted his suit in the proper Court at Attari. The plaint was presented (without a power of attorney) by plaintiff's daughter-in-law, R., who stated that plaintiff came with her and became extremely ill, that he was lying outside the village, and that as the period of limitation was expiring he had sent her on to file it.

On the same date the Court directed the plaint to be kept in the office, and R. to bring the plaintiff in person or else a mukhtar-nama from him.

On 19th February 1877 (after the period of limitation had expired) plaintiff was taken to Court in a doolie and attested a mukhtar-nama by which he appointed his nephew J. S. his mukhtar for the purpose of conducting the suit.

Held that a written authority to present the plaint was not necessary in favor of R. acting as recognized agent of the plaintiff under the proviso to Section 17, Act VIII of 1859, added by Punjab Government Notification No. 1225, dated 26th September 1866, and the Court having in fact accepted and retained the plaint it was filed within time, ...

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M.

Mafidar.—See "Jagirdar."

Muhammadian Jats.—*Navashahr Tahsil—Jullundur District—Quasi adoption—Inheritance*—*Adoption of sister's son*—S., a Muhammadian Jat of the Nawashahr Tahsil, appointed J. his quasi adopted son to be his heir. Found, that custom recognized J.'s right under the circumstances, to inherit the property of S., ...

80

Law—Acknowledgment of son—Legitimation—Legal obstacle to marriage.—D. an undivorced woman left her husband K. who was still living, and went and lived continuously with one J. by whom she had three children.

Held, assuming there was a marriage between J. and D., that D. being undivorced, the marriage could not legally have taken place, and that therefore, the offspring of the connection, even if the paternity was acknowledged by J., was incapable of being legitimated according to Muhammadian Law.

Civil Judgment No. 13, *Punjab Record* 1875, distinguished, ...

71

Custom—Inheritance—Sons and Grandsons—Right of representation.—S. A. died leaving him surviving K. A., a son, and two grandsons S. and M. the sons of A. A., who predeceased his father S. A. In a suit by K. A. claiming, under Mahammadan Law, the entire estate of S. A. deceased—

Found that custom recognized the right of representation, and therefore, that the grandsons were not excluded from inheriting, ...

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Restitution of conjugal rights—Adultery—Violation of marriage contract.—In a suit for restitution of conjugal rights, it was pleaded (among other grounds) that plaintiff had lost his rights by reason of his adultery. *Held* that the fact of plaintiff having had sexual intercourse with prostitutes during the absence of his wife, she persistently for years having refused to live with him, was not so gross

The references are to the Nos. given to the cases in the "Record."

	a violation of the marriage contract as to disentitle plaintiff to the custody of his wife, ...	No. 41
Muhammadan	Sheikhs—Childless village proprietor—Gift to daughter's son of ancestral property. —Found that custom precluded a childless village proprietor from making a gift of his ancestral property to his daughter's son, in the presence of nephews, ...	39
"	Weavers of Jalandhar—Daughters—Succession of—Brothers' sons and grandsons—Ancestral house property. —Found that, by the custom among weavers of Jalandhar, in the presence of daughters, brothers' sons and grandsons are not entitled to succeed to ancestral house property, ...	69
Maintenance—	Suit for arrears of, without rate having been fixed, or demand made—Hindu widow—Practice. —Held by the Full Bench (FITZPATRICK, PLOWDEN AND SMYTH, JJ.) that a suit by a Hindu widow for arrears of maintenance, in the nature of a suit for breach of an obligation to maintain, will lie notwithstanding that the rate of maintenance has not been fixed by agreement or by decree of Court.	
	<i>Held also by the Full Bench (FITZPATRICK, PLOWDEN AND SMYTH, JJ.) that where a maintenance allowance has been fixed no demand is required to be proved to sustain a suit for arrears of such allowance; but where no allowance has been fixed, and the suit is one for damages for breach of the obligation to maintain, it may or may not, according to the circumstances of the case, be necessary to prove a demand in order to establish the breach of the obligation.</i>	
	<i>Held by the Division Bench (LINDSAY AND SMYTH, JJ.) that the amount allowed for the maintenance of a Hindu widow should be in proportion to her wants, that is, her own support and that of those dependent on her, regard being also had in fixing such amount to the means of the estate and the general circumstances of the particular case, ...</i>	14
Mistake of law	or fact—Voluntary payment—Suit to recover—Construction of document. —Where A., misconstruing the terms of a lease, made payments or granted remissions of money to B., and subsequently sued B. to recover back the money on the ground that it had been paid or remitted by mistake, <i>Held</i> , that such mistake was one of law, or ignorance of a particular right, and not a mistake of fact, and therefore, that A. was not entitled to recover, ...	33
Mortgage—	Acknowledgment of. See "Acknowledgment."	
"	Bond—General hypothecation of moveable and immoveable property. —A bond which does not specify the property alleged to be hypothecated, but merely engages that the debt may be realized from the moveable and immoveable property of the debtor, <i>held</i> not to operate as a mortgage, ...	74
"	lien— See "Priority."	
"	of occupancy rights.—Death of occupancy tenant without heirs—Right of mortgagee as against proprietor—Punjab Tenancy Act, XXVIII of 1868, Sections 34 and 35. —Plaintiff, proprietor, sued to recover possession of land held by defendant, mortgagee of Sharafdin, occupancy tenant, who died without heirs two years before suit was	

The references are to the Nos. given to the cases in the "Record."

- brought. *Held* that plaintiff was entitled to a decree, as the interest of the mortgagee in the land could be no greater and last no longer than that of the mortgagor (occupancy tenant) from whom it was derived, and that the mortgagor's interest having come wholly to an end by reason of his death without heirs, the mortgagee's interest ceased with it, even if the mortgage was made with the proprietor's knowledge or was afterwards assented to by him, ... 79
- Mortgage—Pre-emption—Custom—Act IV of 1872, Sections 7 and 10.*—Found by the custom of Monza Majri, Tahsil and Zilla Umballa, that the right of pre-emption extends to mortgages; and *held*, following No. 53 *Punjab Record* 1877, that effect must be given to such custom under Section 7, Act IV, of 1872, notwithstanding Section 10 of that Act, ... 49
- „ *Redemption of, in part—Suit by one sharer.*—*Held* that a suit will not lie to redeem a share of property mortgaged, ... 76
- Moveable property—Sale of, in execution of decree—Title acquired by purchaser—Property wrongly attached and sold—Remedies of real owner of goods—Civil Procedure Code Act X of 1877, Sections 266 and 287.*—Where moveable property belonging to A was attached and sold in execution of a decree against B, *held* that A was entitled to sue the auction-purchaser for the restoration of the specific moveable or for its value.
- The purchaser of moveable property at an execution sale does not take an absolutely unimpeachable title to the property, and the fact that the real owner may have a remedy by a suit for damages against the execution-creditor for causing the property to be attached and sold does not debar him from bringing a suit to recover the property itself from the auction-purchaser, ... 82
- N.
- Near Relative, Adoption of—Construction of Riwaj-i-am.*—B S. whose father D. S. had been adopted by a collateral G., was adopted by S. D., own brother of D. S. The *riwaj-i-am* of the district ran to the effect that "among Bujwa Rajputs a proprietor may, having regard to near "relationship, adopt a son from collaterals descended from the same "common ancestor, but may not adopt a person from another "caste, or a daughter's son, or a sister's son, or a son-in-law."
- It was also found after a local enquiry that no custom existed which would render the adoption invalid.
- Held* that the proper construction of the *riwaj-i-am* was not that the nearest relative must be adopted, so as to invalidate the adoption of a relative otherwise eligible. The rule of *factum valet* would apply; and as no other custom existed rendering the adoption invalid, it must be upheld, ... 47
- Nuisance—Public thoroughfare—Street—Suit to close a drain.*—Plaintiff sued to compel defendant to close a drain through which the water from his mosque flowed on to the public street in front of plaintiff's premises. *Held* that the suit was not maintainable without proof of special damage, differing not merely in degree but in kind from that sustained by the rest of the public, ... 10

The references are to the Nos. given to the cases in the "Record."

O.

No.

- Onus of proof.—Ancestral property—Liability of, for debts contracted for immoral purposes.*—No inflexible general rule can be laid down, in a suit by a creditor against the son of a deceased Hindu, in order to declare ancestral property in the hands of the latter liable to sale in satisfaction of the debt sued upon, as to whether the plaintiff is bound to prove the nature of the debt, or the defendant.
Question discussed as to whom the onus would lie on under certain circumstances, ... 16
- Occupancy rights—Tenancy Act (XXVIII of 1868) Section 5, Clause 4—Jagirdar. Mafidar.*—Held that the term jagirdar includes a mafidar in Clause 4, Section 5, Act XXVIII of 1868, ... 12
- " " *Section 9—Shamilat or common land.*—Section 9 of Act XXVIII of 1868, which enacts that a tenant cannot acquire rights of occupancy in common land under Chapter II of the Act, does not apply to cases where occupancy rights in common land have been acknowledged prior to the promulgation of that Act.
- " *Civil Judgment No. 30, Punjab Record for 1872, distinguished, Death of occupancy tenant without heirs—Right of mortgagee as against proprietor—Punjab Tenancy Act, XXVIII of 1868, Sections 34 and 35.*—Plaintiff, proprietor, sued to recover possession of land held by defendant, mortgagee of Sharafdin, occupancy tenant, who died without heirs two years before suit was brought. Held that plaintiff was entitled to a decree, as the interest of the mortgagee in the land could be no greater and last no longer than that of the mortgagor (occupancy tenant) from whom it was derived, and that the mortgagor's interest having come wholly to an end by reason of his death without heirs, the mortgagee's interest ceased with it, even if the mortgage was made with the proprietor's knowledge or was afterwards assented to by him, ... 31
- Occupation of land by person without title—Erection of buildings—Delay on part of owner in bringing suit—Acquiescence—Relief to which occupier without title is entitled.*—Defendants occupied and erected *katcha* buildings upon land belonging to the plaintiffs. After a period of 6 or 7 years plaintiffs sued to eject the defendants from the land. Held that defendants were not entitled to continue in possession of the *katcha* buildings but were entitled to remove the materials thereof.
Mere delay on the part of an owner of land in suing a person in possession without title, who erects buildings on the land he has illegally occupied, does not entitle the possessor to be maintained in possession. The particular relief to which a possessor so situated is entitled must depend upon the circumstances of the case, ... 79
- 53

P.

- Punjab Tenancy Act XXVIII of 1868.*—See "*Tenancy Act.*"
- Parol evidence—Admissibility of.*—See "*Evidence Act (I of 1872) Section 91.*"
- Partition of a share in joint immoveable property owned by Hindus, purchased by a Muhammadan.*—R. obtained a decree against one M., a Hindu, in

The references are to the Nos. given to the cases in the "Record."

- execution of which M.'s eighth share in a haveli was sold by public auction, and purchased by B. K. a Mahomedan. In a suit instituted by B. K. for partition, which was resisted by the remaining sharers in the haveli, who were Hindus, *held* that B. K. was entitled to partition and possession of the share purchased by him, ... 15
- Partition—Right of widow to, in a joint estate.—Jurisdiction—Civil Court—Act XXXVIII of 1871, Section 65, Clause 2.*—Plaintiff, a widow, on the death of B., her husband's father, in 1872, was recorded as owner of a fifth share in the khata owned by B. and since then had received from defendants, the widow and sons of B., who were recorded as owners of the remaining four shares, a fifth share of the produce of the khata. Defendants having ceased to give plaintiff her fifth share of the produce, she instituted a suit for partition, which was contested by the defendants.
- Held* that as the right to partition was contested, the suit was not barred from the cognizance of the Civil Courts by Clause 2 Section 65 of Act XXXVIII of 1871.
- Held* further, that plaintiff was entitled to partition.
- Per* FITZPATRICK, J.—Because there had been a separation in interest and right between the parties, notwithstanding that there had been no actual division, and the joint family relationship between them had thus been put an end to.
- Per* PLOWDEN, J.—Because the plaintiff was equitably entitled to such relief, as being best calculated to secure to her rights which the defendants omitted to recognize in practice, ... 22
- Partnership—Suit to wind up a partnership business—Jurisdiction—District Court—Extra Assistant Commissioner's Court.*—See "*Jurisdiction.*"
- Payments in satisfaction of decree, made out of Court but not certified to the Court.* See "*Civil Procedure Code (Act VIII of 1859) Section 206*"—"*Execution of decree.*"
- Payment, Voluntary.—Suit to recover—Mistake of law or fact—Construction of document.*—Where A., misconstruing the terms of a lease, made payments or granted remissions of money to B., and subsequently sued B. to recover back the money on the ground that it had been paid or remitted by mistake, *Held*, that such mistake was one of law, or ignorance of a particular right, and not a mistake of fact, and therefore, that A. was not entitled to recover, ... 33
- Pensions Act (XXIII of 1871), Section 11—Pension—Assignment of land revenue for benefit of shrine.*—The revenue of certain land was assigned to the custodian of a shrine for the benefit thereof. *Held*, that such assignment of land revenue was not a pension within the meaning of Section 11 of the Pensions Act XXIII of 1871, ... 27
- Plaint, return of, after trial on the merits—Power of Appellate Court.*—An Appellate Court has power to direct the return of a plaint, notwithstanding a trial upon the merits in the first Court, if it be found that such Court ought to have returned it under Section 57 (a) of Act X of 1877, ... 55
- „ filed by recognized agent without power of attorney—Acceptance of plaint by Court—Limitation—Act VIII of 1859, Section 17—Punjab Government Notification No. 1225, dated 26th September 1866.*—On 30th

The references are to the Nos. given to the cases in the "Record."

No.

January 1877, (before the period of limitation had expired) plaintiff instituted his suit in the proper Court at Attari. The plaint was presented (without a power of attorney) by plaintiff's daughter-in-law, R., who stated that plaintiff came with her and became extremely ill, that he was lying outside the village, and that as the period of limitation was expiring he had sent her on to file it.

On the same date the Court directed the plaint to be kept in the office, and R. to bring the plaintiff in person or else a mukhtar-nama from him.

On 19th February 1877 (after the period of limitation had expired) plaintiff was taken to Court in a doolie and attested a mukhtar-nama by which he appointed his nephew J. S. his mukhtar for the purpose of conducting the suit.

Held that a written authority to present the plaint was not necessary in favor of R. acting as recognized agent of the plaintiff under the proviso to Section 17, Act VIII of 1859, added by Punjab Government Notification No. 1225, dated 26th September 1866, and the Court having in fact accepted and retained the plaint it was filed within time, ...

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Pleader—Agreement by, for extra remuneration contingent on success—Contract Act IX of 1872, Sections 10 and 23—Act XX of 1865, Section 39.—Held by the Full Bench, that the effect of Section 39 of Act XX of 1865 is not to restrict the power of a pleader and client to settle by private agreement the remuneration to be paid to the former by the latter for professional services, but to leave them at full liberty to make such agreements, subject to the provisions of the general law of contract.

The validity of such an agreement when called in question must be determined by applying the tests prescribed in the Contract Act, 1872.

Held, further by the Full Bench, that an agreement between a pleader and client regarding the remuneration for professional services of the former in conducting a legal proceeding for his client in Court, which stipulates for payment to the pleader, in addition to a sum to be paid in advance, of a further sum conditional upon success, is not void as being opposed to public policy, merely because it contains such a stipulation.

Circumstances affecting the validity of such agreements considered.

The decision of the majority of the full Bench in Civil Judgment No. 26, *Punjab Record* for 1874, regarding the operation of Section 39, Act XX of 1865, dissented from, ...

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Pre-emption.—Limitation—Act IX of 1871, Schedule II, No. 10—Actual possession.—On 3rd February 1876, B. R. purchased a shop from P. The shop was occupied by a tenant who accepted B. R. as his landlord on the same date, and agreed to pay the rent to him. No formal deed of sale was executed or registered till April 1876, owing to the vendor P. being in jail in execution of a decree, but the shop was verbally sold on 3rd February 1876, and a mortgage deed relating to the shop made over to the vendee B. R. In March 1877 the plaintiff instituted his suit for pre-emption.

The references are to the Nos. given to the cases in the "Record."

- Held* that the sale was complete on 3rd February 1876, that B. R. took "actual possession" on that date within the meaning of Article 10, Schedule II, Act IX of 1871, and that, accordingly, the claim was barred by limitation, ...
- Pre-emption—Mortgage—Custom—Act IV of 1872, Sections 7 and 10.*—Found by the custom of Mouza Majri, Tahsil and Zilla Umballa, that the right of pre-emption extends to mortgages; and *held*, following No. 53 *Punjab Record* 1877, that effect must be given to such custom under Section 7, Act IV of 1872, notwithstanding Section 10 of that Act, ...
- Relationship—Hereditary occupant of land sold.*—Plaintiff claiming a right of pre-emption was collaterally related in the 8th degree to the vendors, while the vendees were collaterally related in the 9th degree, and were also hereditary cultivators of the land sold, and had been in possession of it for a long time. On the latter ground the Courts below dismissed the plaintiff's suit. *Held* by the Chief Court that the plaintiff being nearer in the order of relationship, was entitled to a decree, under Section 14, Act IV of 1872. ...
- Waiver of right by first pre-emptor in favour of stranger—Subsequent assertion of right against second pre-emptor—Estoppel.*—*Held* that a pre-emptor, who has once waived his right to accept or insist upon an offer of sale, cannot afterwards come forward and re-assert his right against another person who has claimed pre-emption in the same sale, and obtained a decree transferring the property to himself, ...
- suit—Valuation of, for purposes of jurisdiction.*—See "*Jurisdiction*" and "*Valuation.*"
- Principal and Surety—Liability of creditor to take legal proceedings against principal debtor—Discharge of sureties—Act IX of 1872, Sections 134, 137 and 139, English Bankruptcy Act 1869 (32 & 33 Vict. Chapt. 71).*—Plaintiff sued on a bond, the cause of action on which accrued on 15th September 1868, and relied on a series of letters from defendant extending from 14th June 1870 to 23rd June 1872 as acknowledgments. The claim as against the principal debtor was barred. The letters generally complained of the way in which Dr. Menzies, the principal debtor, and his son—who was one of the sureties—were evading their obligations, and urging on the Bank (plaintiff) the necessity of taking vigorous measures against them, so as to protect the writer, Dr. Morice (defendant), and the third surety, Captain Price, from the loss which otherwise they would suffer. Dr. Morice wrote throughout as a surety still liable for the debt.
- In one letter dated 16th June 1871 Dr. Morice wrote as follows:—
- "As Dr. Menzies has behaved in a most dishonest and disgraceful manner, I think he ought to suffer and not the securities,.....
- "I trust the Bank will in fairness to the securities take all steps in their power to make Dr. Menzies pay his own debts.....
- "I will agree to anything it proposes."
- The letters of 21st and 23rd June 1872, contained the following:—

The references are to the Nos. given to the cases in the "Record."

No.

"I have just heard from Captain Price, and I think we can make arrangements regarding Dr. Menzies' debt to the Bank provided the Bank is not too hard on us. I shall be glad to hear what the Bank propose."

"It is quite impossible for us to pay the whole of Dr. Menzies' debt, including interest, down, but we might come to some arrangement that would be fair to the Bank without being utterly ruinous to ourselves."

On or about 8th June 1870, Dr. Menzies fled from India, without giving any intimation to the Bank. After some correspondence with the sureties, and after writing to England to Dr. Menzies threatening proceedings, the Bank by a letter dated 22nd November 1870, put the matter in the hands of their London Solicitor, Mr. Lattey.

It turned out that Dr. Menzies had gone to live in Guernsey, and the Attorney General of that island, who was consulted, gave an opinion to the effect that proceedings could not be taken in the Courts there until Dr. Menzies had resided there a year and a day. Before the time for proceeding arrived, Dr. Menzies fled to some place on the Continent, and when next the Bank got a distinct clue to his whereabouts he was at Buenos Ayres in South America.

Then followed correspondence in which the possibility of following him there was discussed, but the difficulties were great. On 23rd August 1872 Mr. Lattey advised the Bank to abandon the idea of instituting proceedings in Buenos Ayres. He wrote—"I am free to confess that such steps if taken would, in my opinion, be accompanied with considerable risk as to costs, and more than a strong chance of a futile result." On this advice the Bank acted.

On the 8th June 1871 Dr. Menzies was declared a bankrupt in England, and the Bank accepted a dividend under his bankruptcy in England.

On 27th April 1872, and again on 23rd June 1872, Dr. Morice, by letter, urged the Bank to institute proceedings against Dr. Menzies, and said he and his co-surety Captain Price were willing to pay expenses.

To the second letter the Secretary to the Bank replied on 28th June 1872—"I note that you are willing to pay the expenses of prosecuting Dr. Menzies at Buenos Ayres. I am now taking steps to have this done, but it must necessarily be a good many months before the result can be known."

Held, that the Bank was not bound to take legal proceedings against Dr. Menzies, but that such a duty was cast on the Bank by its correspondence with Dr. Morice, and that it had done all that a prudent man would do under the circumstances, and properly discharged the duty it had taken upon itself by its Secretary's letter of 28th June 1872; and further, that even if the Bank by the letter of 28th June 1872 had undertaken absolutely, and at all risks, to proceed against Dr. Menzies, still its neglect to do so would not release Dr. Morice, unless it could be shown that Dr. Menzies was then solvent and had since become insolvent.

The references are to the Nos. given to the cases in the "Record."

Held, further, that the sureties were not discharged by reason of the Bank allowing the claim against Dr. Menzies to become barred by lapse of time, as the law of limitation did not discharge the principal or extinguish the debt, but merely barred the remedy, ...
Principal and Surety—Money rightfully paid—Payment by Surety of debt barred as against principal—Contract Act IX of 1872, Section 145.—Plaintiff, a surety, sued his principal to recover the amount paid by him under a decree obtained by the creditor against him as surety. In that suit the principal debtor was also sued, and the decree in the first court was against both. The principal appealed, and the decree against him was reversed on the merits. The surety did not appeal, but acquiesced in the decree against himself. The action of the creditor as against the principal debtor was barred by limitation, and the action against the surety would also have been barred, but for the fact that he had, before expiry of the period of limitation, struck a balance of the account against the principal, and signed an acknowledgment that the balance was due.

No.

2

Held under the circumstances that plaintiff was not entitled to recover from his principal the amount which he had been compelled to pay under the decree against him.

A moral obligation to pay a debt barred by limitation subsists, though the legal means of recovering it have been lost, but a surety paying such a debt does not pay "rightfully" within the meaning of Section 145 of the Contract Act IX of 1872, and is therefore not entitled to recover from his principal, ...

30

Priority—Succession Act (X of 1865), Section 282—Distribution of assets—Mortgage lien—Interest on claim secured by decree.—In July 1876 B. took out letters of administration of the estate of O'C. deceased. The largest creditor was B. himself, who held a lien on a life policy, which represented almost the entire assets of the deceased. B.'s claim was however under a decree which carried no interest. The remaining creditors contended that B. was only entitled to his *pro rata* share under Section 282 Act X of 1865, and also that he was entitled to no interest on his claim.

Held that, the only claims to priority intended to be excluded by Section 282 were claims on the ground that the debt is a specialty debt, and on other grounds *ejusdem generis*, and therefore, that B. was entitled to be first paid.

Held further, that B.'s claim being based upon a decree which did not provide for the payment of interest, he was not entitled to interest on it, ...

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Public document—Evidence Act I of 1872, Section 65—Secondary evidence other than certified copy—Admissibility of, when document is lost.—*Held* that secondary evidence of a lost public document, other than a certified copy, is admissible upon proof of loss or destruction of the original, and further proof that no certified copy of the original is available to the party seeking to prove the contents of the original.

Held further that so long as the original is in existence, no secondary evidence other than a certified copy is admissible, ...

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The references are to the Nos. given to the cases in the "Record."

- Public Thoroughfare—Street—Nuisance—Suit to close a drain.*—Plaintiff sued to compel defendant to close a drain through which the water from his mosque flowed on to the public street in front of plaintiff's premises. *Held* that the suit was not maintainable without proof of special damage, differing not merely in degree but in kind from that sustained by the rest of the public, ... 10
- Public Policy—Agreement at marriage not to remove wife from parents' house.*—Plaintiff on his marriage executed an agreement binding himself never to take his wife away from her parents' house or town, under a penalty of freeing his wife from the marriage tie. *Held* that the agreement was contrary to public policy, and therefore was no answer in a suit by the plaintiff for the custody of his wife, ... 20
- Purchaser of moveable property at execution sale, title acquired by.*—See "*Execution of decree*" and "*Moveable property.*"

Q.

Quasi adoption.—See "*Adoption.*"

R.

- Raiens of Hoshiarpur district—Custom—Gift to daughter's son—Village proprietor without male issue.*—Found that no custom existed amongst the Raiens of the Hoshiarpur district which precluded a village proprietor without male issue from making a gift of all his property to his daughter's son, ... 37
- Rajputs—Bujwa tribe—Sialkot District—Custom—Adoption—Construction of Rivaj-i-am—Near relative.*—B. S. whose father D. S. had been adopted by a collateral G., was adopted by S. D., own brother of D. S. The *rivaj-i-am* of the district ran to the effect that "among Bujwa "Rajputs a proprietor may, having regard to near relationship, "adopt a son from collaterals descended from the same common "ancestor, but may not adopt a person from another caste, or "a daughter's son, or a sister's son, or a son-in-law."
- It was also found after a local enquiry that no custom existed which would render the adoption invalid.
- Held* that the proper construction of the *rivaj-i-am* was not that the nearest relative must be adopted, so as to invalidate the adoption of a relative otherwise eligible. The rule of *factum valet* would apply; and as no other custom existed rendering the adoption invalid, it must be upheld, ... 47
- Ratification—Sanction to Settlement.*—See "*Settlement.*"
- Recognized Agent—Plaint filed by, without power of attorney.*—See "*Plaint.*"
- Redemption of mortgage.*—See "*Mortgage.*"
- Registration Act (VIII of 1871) Sections 17 and 49—Evidence Act (I of 1872) Section 91—Unregistered mortgage accompanied by possession—Subsequent registered mortgage—Admissibility of parol evidence.*—C. S. mortgaged his land to D. S. by deed dated 26th July 1873 for Rs. 620. The deed, however, was not registered as required by Section 17 of Act VIII of 1871. C. S. again mortgaged the land to one C. by registered deed dated 13th July 1874 for Rs. 700. In a suit by

The references are to the Nos. given to the cases in the "Record."

- C. against C. S. and D. S. for possession of the mortgaged lands:—*Held* that the unregistered mortgage to D. S. whether accompanied by possession or not was invalid as against the registered mortgage to C., and that D. S. was precluded by Section 49 Act VIII of 1871 from proving that the land was mortgaged to him under the deed of 1873, and was further precluded by Section 91 of the Evidence Act, 1872, from proving it by oral evidence, ...
- Registration—Admission—Receipt of consideration.*—The admission before the Registering officer of the receipt of consideration is evidence, but not necessarily conclusive evidence of the payment of the consideration stated to have been paid, ...
- Rent, Enhancement of.—Tenancy Act, XXVIII of 1868, Sections 2 and 11.—Agreement.*—Defendants held certain land under an agreement, dated 10th August 1853, the terms of which were also embodied in the *wajib-ul-arz* of the village, entitling them to hold the land for ever as cultivators, giving a certain share of the produce to plaintiff. In a suit brought by plaintiff, *held* that he was not entitled to enhancement of rent under Section 11, by reason of Section 2, Act XXVIII of 1868, ...
- Representation, right of.*—See "*Mahomedan Law*" and "*Inheritance.*"
- Residence of Insolvent—Jurisdiction of Insolvent Estates Court—Act IV of 1872, Sections 22 and 23.*—P. in order to take advantage of the Insolvent Estates Court at Lahore, rented a house in Lahore and resided in it from time to time for the express purpose of bringing himself within the jurisdiction of the Lahore Court. His ordinary place of residence before he presented his petition was and continued to be Umballa, where his wife and children were, and he had never carried on business at Lahore. *Held* that P's residence under the circumstances was not sufficient to give the Lahore Court jurisdiction. A debtor who does not reside or carry on business and who owes no debts within the local limits of the jurisdiction of the Insolvency Court to which he applies under Section 23 Act IV of 1872, is not entitled so to apply, and does not become entitled by coming to reside temporarily within the jurisdiction with the sole and express object of making such application, ...
- Res-judicata—Act VIII of 1859, Section 2.*—*Held*, that an order refusing an application to execute a decree is not an adjudication within the rule of *res-judicata* or within Section 2 of Act VIII of 1859, ...
- " *Civil Procedure Code, (Act VIII of 1859), Sections 2 and 32—Rejection of plaint under Section 32—Institution of new suit on same cause of action.*—N. M. and B. D., brothers, with their brother B. were recorded in the Settlement papers as joint owners of a holding. B. D. applied in 1877, in the Revenue department, for partition of his share, and the partition was objected to by N. M. on the ground that the holding had been divided in July 1874 by private partition and was no longer joint. The objection was disallowed, and, on 20th December 1876, a partition was made and sanctioned.
- On 22nd March 1877, N. M. brought a suit against B. D. and B. to cancel the partition made in the Revenue department, but the plaint was on the same day rejected on the ground that under Sec-

The references are to the Nos. given to the cases in the "Record."

tion 65 of the Punjab Land Revenue Act, 1871, such a suit was not maintainable.

Meanwhile, N. M. appealed to the Commissioner from the order of partition dated 20th December 1876 made by the Revenue authorities, who on 19th July 1877 suspended that order so as to allow N. M. an opportunity to bring a civil suit. Accordingly on 18th August 1877 N. M. brought a fresh suit against B. D. and B. to prove that the holding had been privately divided in July 1874.

Held, assuming the order in the first suit to have been passed under Section 32, Act VIII of 1859, that the second suit was barred by Section 2, Act VIII of 1859.

Where a plaint is rejected under Section 32, a fresh plaint cannot be entertained on the same cause of action, ...

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Restitution of conjugal rights.—See "*Conjugal rights, restitution of.*"

Reversioner, Nearest—Waiver by—Suit to set aside alienation brought by distant reversioner.—Plaintiffs, distant reversioners, sued to cancel a mortgage made by a Mahomedan widow, with a life interest only in her deceased husband's estate,—*held*, that the suit was not maintainable in the absence of proof that the immediate reversioner had waived or abandoned his rights in favor of plaintiffs.

Civil judgment No. 39 of 1876, *Punjab Record*, commented on and explained, ...

65

Review—Decree on confession—Civil Procedure Code (Act VIII of 1859) Sections 98 and 376—Agent, authority of, to confess judgment—Circumstances under which principal is entitled to relief.—On 24th February 1877, plaintiff instituted a suit against defendant to establish his right to the office of Diwan of the khangah of Miran Sahib at Thuska, and to share in the management of the institution. Defendant was summoned for 20th March 1877 for settlement of issues. On 7th March 1877, before the summons was served, defendant's general agent or muktar, Mahomada Shah, appeared and confessed judgment, upon which a decree was passed in favour of plaintiff.

On 29th March 1877 defendant, through his pleader, applied for review of judgment on the grounds that, 1st, the decree on confession of judgment had been passed before the date fixed for hearing, and 2nd, that the confession of judgment had been made without defendant's consent or authority. The application was rejected on the ground that Mahomada Shah's power of attorney gave him power to confess judgment and bind defendant.

Held by Smyth, J., following No. 37, *Punjab Record*, 1877, that defendant was entitled to relief, unless it could be shown that the agent was in point of fact expressly or impliedly authorized to make the confession of judgment sought to be impeached.

Held by Plowden, J., that even if the power of attorney was sufficient in itself, and without any further instrument of authorization to confer upon the agent authority to confess judgment generally, the defendant would be entitled to relief if he could show that the general authority had, in the particular case, been exercised in such a manner or with such results that it would be unjust to hold him bound by his agent's act.

The references are to the Nos. given to the cases in the "Record."

- No.
- Per* FLOWDEN, J.—Under the Code of Civil Procedure, a decree by consent may be set aside by review if the attainment of the ends of justice require it, and, therefore, that if it appeared that the confession of judgment had been made by the agent under such circumstances that it operated as a fraud upon the defendant, or was made in error or acted as a surprise upon him, he would be *prima facie* entitled to the relief sought, ... 58
- Review—Second application for—Civil Procedure Code (Act X of 1877) Section 629.*—A second application for review is in effect an application to review an order passed on an application for review, and cannot therefore, under the last clause of Section 629, Act X of 1877, be entertained, 6
- Right of way—Easement—Limitation Act IX of 1871, Section 27.*—In a suit for an easement or right of way, the question for decision is whether the way has been openly and peaceably used and as of right without interruption for a period of 20 years ending within two years next before the institution of the suit. (Section 27, Act IX of 1871). Where it was found that the way was not used for more than ten years at most, held that the plaintiff's claim to a right of way failed, 25

S.

- Sale in execution.*—See "*Execution of decree.*"
- „ of vacant site occupied by proprietor for many years—*Village site—Abadi—Consent of co-sharers—Custom.*—See "*Village site*" and "*Custom.*"
- Second regular appeal.*—See "*Appeal.*"
- Settlement*—Sanction to, does not amount to a ratification of all the acts of a Settlement officer, ... 1

Settlement officers—Powers of, under Board's Circular 8 of 11th February 1852 to make grants of zamindari in Khana Khalee or Government estates—Sanction to Settlement—Ratification—Estopped.—By an order of the Settlement officer of the Ambalah district dated 24th March 1852, one D, was granted the zamindari of Raiyanwala, and his name was directed to be entered in the proprietary column in the Settlement papers. In pursuance of this order the subordinate Settlement officials recorded D. as proprietor of each field or plot in the village, including two plots now in dispute. The Settlement officer was acting under the authority of Revenue Circular No. 8 dated 11th February 1852, of the Board of Administration, which authorized Settlement officers to grant the zamindari or proprietary rights in *Khana Khalee* or Government estates to private persons.

It did not appear that the Settlement officer had his attention drawn to the fact that, although the entire village of Raiyanwala belonged to Government, there were portions of it which were in the possession of the Canal department, and part of it occupied by the bed of the Western Jamua Canal. All such portions, including even the bed of the canal, were recorded as the property of D. in pursuance of the above order.

It was found that the two plots in dispute formed part of the land then in possession of the Canal department, and that they had been in possession prior to the grant to D. and had continued in possession up to the present date, and had all along used the plots for canal

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purposes. In 1860 certain letters passed between D.'s representatives and the Commissioner and Deputy Commissioner of Umballa. The Deputy Commissioner heard that negotiations were going on for the sale of D's. estate. He pointed out that they would not be allowed to sell the farms of certain villages which had been held by D. and the terms of which had not then expired, as these were not transferable; and that as regards the villages held by D. in proprietary right, they must sell to the resident cultivators, who had the right of pre-emption. The cultivators were unable to purchase, and eventually D's. representatives sold the village of Raiyanwala to plaintiffs, on which *dakhil kharij* or mutation of names took place.

Held by FITZPATRICK, J., that the grant of the zamindari did not include the two plots in dispute, which were looked upon as part of the canal.

Per SMYTH, J., that the Settlement officer exceeded his authority in granting the zamindari without reserving to Government the plots in dispute, as the Circular of the Board of Administration referred only to lands which were used for agricultural purposes, or which might by reclamation or otherwise be used for such purposes, and did not include lands held by Government for public purposes.

Per Curiam.—That the Government in sanctioning the Settlement of the Umballa district did not ratify all the acts of the Settlement officer, including the grant of the entire village of Raiyanwala; and that plaintiffs had failed to show any acts or admissions on the part of the officers of Government since the date of the grant which would have the effect of estopping Government from contesting plaintiff's claim, ...

Shamilat land.—See "*Common Land.*"

Sister's grandson.—*Adoption of.*—See "*Adoption.*"

Sister's son.—*Adoption of.*—See "*Adoption.*"

Small Cause Court.—*Jurisdiction.*—See "*Jurisdiction.*"

Stamp Act (XVIII) of 1869, Section 18.—*Unstamped document.*—*Admission of, in evidence by first Court.*—*Power of Appellate Court to interfere.*—A Court of first instance admitted in evidence an unstamped acknowledgment of a debt, which embraced items more than 3 years old, and consequently barred by limitation. *Held* that the Appellate Court was precluded from taking up the question whether the acknowledgment had, under the provisions of Act XVIII of 1869, been wrongly admitted in evidence as unstamped, ...

" *Schedule II, No. 5.*—*Acknowledgment.*—Plaintiff sued on a bond, the cause of action on which accrued on 15th September 1868, and relied on a series of letters from defendant extending from 14th June 1870 to 23rd June 1872 as acknowledgments. The claim as against the principal debtor was barred.

The letters generally complained of the way in which Dr. Menzies, the principal debtor, and his son—who was one of the sureties—were evading their obligations, and urging on the Bank (plaintiff) the necessity of taking vigorous measures against them, so as to protect the writer, Dr. Morice (defendant), and the third surety, Captain Price, from the loss which otherwise they would

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suffer. Dr. Morice wrote throughout as a surety still liable for the debt.

In one letter dated 16th June 1871 Dr. Morice wrote (as follows):—

"As Dr. Menzies has behaved in a most dishonest and disgraceful manner, I think he ought to suffer and not the securities,.....
"I trust the Bank will in fairness to the securities take all steps
"in their power to make Dr. Menzies pay his own debts.....
"I will agree to anything it proposes."

The letters of 21st and 23rd June 1872, contained the following:—

"I have just heard from Captain Price, and I think we can make arrangements regarding Dr. Menzies' debt to the Bank provided the Bank is not too hard on us. I shall be glad to hear what the Bank propose."
....."It is quite impossible for us to pay the whole of Dr. Menzies' debt, including interest, down, but we might come to some arrangement that would be fair to the Bank without being utterly ruinous to ourselves."

On or about 8th June 1870, Dr. Menzies fled from India, without giving any intimation to the Bank. After some correspondence with the sureties, and after writing to England to Dr. Menzies threatening proceedings, the Bank by a letter dated 22nd November 1870, put the matter in the hands of their London Solicitor, Mr. Lattey.

It turned out that Dr. Menzies had gone to live in Guernsey, and the Attorney General of that island, who was consulted, gave an opinion to the effect that proceedings could not be taken in the Courts there until Dr. Menzies had resided there a year and a day. Before the time for proceeding arrived, Dr. Menzies fled to some place on the Continent, and when next the Bank got a distinct clue to his whereabouts he was at Buenos Ayres in South America.

Then followed correspondence in which the possibility of following him there was discussed, but the difficulties were great. On 23rd August 1872 Mr. Lattey advised the Bank to abandon the idea of instituting proceedings in Buenos Ayres. He wrote—"I am free to confess that such steps if taken would, in my opinion, be accompanied with considerable risk as to costs, and more than a strong chance of a futile result." On this advice the Bank acted.

On the 8th June 1871 Dr. Menzies was declared a bankrupt in England, and the Bank accepted a dividend under his bankruptcy in England.

On 27th April 1872, and again on 23rd June 1872, Dr. Morice, by letter, urged the Bank to institute proceedings against Dr. Menzies, and said he and his co-surety Captain Price were willing to pay expenses.

To the second letter the Secretary to the Bank replied on 28th June 1872—"I note that you are willing to pay the expenses of prosecuting Dr. Menzies at Buenos Ayres. I am now taking steps to have this done, but it must necessarily be a good many months before the result can be known."

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Held, that the letters did not require a stamp under Article 5, Schedule II Act XVIII of 1869. The words "note or memorandum whereby a debt is acknowledged to be due," (Article 5) mean a document made for the purpose of recording and affording evidence of an acknowledgment of a debt, and do not include every letter or other writing which though written without any idea whatever of securing evidence of an acknowledgment happens incidentally to contain an acknowledgment express or implied, ...

Stolen currency note—Bond fide holder—"Goods"—Contract Act IX of 1872—Sections 76 and 108.—R. L., of Rohtak was robbed of a currency note by one N., who brought it to Delhi, and with the assistance of H., got it cashed by R. N., who passed it for full consideration to M. D.

The Rohtak police traced the note to M. D., seized half of it and gave it in as evidence in the Criminal case against the thief N.; the latter was convicted and by order of the Magistrate the half note was handed over to R. L., who subsequently sued before the Judicial Assistant of Rohtak and obtained a decree (ex parte) against M. D., for the other half note, or (alternatively) for Rs. 100.

In a suit by M. D., against R. N., from whom he received the note, to recover its value, *held* that M. D. was not entitled to recover, he having received full consideration from R. N.

The title of the *bond fide* holder, for consideration, of a currency note, is not defective by reason of a defect in the title of a previous holder.

Held further, that the fact of M. D. having been deprived of his note by a decree of the Judicial Assistant of Rohtak did not give him a cause of action against R. N., from whom he obtained it,

Street.—See "*Public Thoroughfare.*"

Succession Act (X) of 1865, Section 282—Distribution of assets—Priority—Mortgage lien—Interest on claim secured by decree.—In July 1876 B. took out letters of administration of the estate of O.C. deceased. The largest creditor was B. himself, who held a lien on a life policy, which represented almost the entire assets of the deceased. B.'s claim was however under a decree which carried no interest. The remaining creditors contended that B. was only entitled to his *pro rata* share under Section 282, Act X of 1865, and also that he was entitled to no interest on his claim.

Held that, the only claims to priority intended to be excluded by Section 282 were claims on the ground that the debt is a specialty debt, and on other grounds *ejusdem generis*, and therefore, that B. was entitled to be first paid.

Held further, that B.'s claim being based upon a decree which did not provide for the payment of interest, he was not entitled to interest on it, ...

Succession.—See "*Inheritance.*"

Suit by sharer in a joint khata for recovery of particular lands.—*Held* that a sharer in a joint khata cannot maintain a suit against his co-sharer for the recovery of particular lands unless he can show either that he has been forcibly dispossessed of those lands, or that he made them

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The references are to the Nos. given to the cases in the "Record."

- over to his co-sharer under a contract by virtue of which he is entitled to have them restored to him, No. 21
- Suit to recover value of cattle wrongfully and fraudulently received by defendants.—Limitation Act IX of 1871, Schedule II, No. 95.*—Plaintiff sued to recover the value of cattle wrongfully and fraudulently received by defendants, representing themselves as agents of S., and appropriated by them to their own use. *Held* that the suit was one coming under No. 95, Schedule II, Act IX of 1871, and that limitation began to run from the time when the alleged fraud became known to the plaintiff, 19
- ” *Voluntary payment.*—See “*Payment-Voluntary.*”
- Surety and Principal.*—See “*Principal and Surety.*”
- T.**
- Tenancy Act, XXVIII of 1868, Sections 2 and 11.*—*Enhancement of rent—Agreement.*—Defendants held certain land under an agreement, dated 10th August 1853, the terms of which were also embodied in the *wajib-ul-arz* of the village, entitling them to hold the land for ever as cultivators, giving a certain share of the produce to plaintiff. In a suit brought by plaintiff, *held* that he was not entitled to enhancement of rent under Section 11, by reason of Section 2, Act XXVIII of 1868, 50
- ” *Section 5, Clause 4—Occupancy rights—Jagirdar.*
- ” *—Masfidar.*—*Held* that the term jaghirdar includes a masfidar in Clause 4, Section 5, Act XXVIII of 1868, 12
- ” *Section 9—Shamilat or common land—Occupancy rights.*—Section 9 of Act XXVIII of 1868, which enacts that a tenant cannot acquire rights of occupancy in common land under Chapter II of the Act, does not apply to cases where occupancy rights in common land have been acknowledged prior to the promulgation of that Act.
- ” *Civil Judgment No. 30, Punjab Record for 1872, distinguished,* 31
- ” *Sections 34 and 35—Occupancy rights, Mortgage of.* *Death of occupancy tenant without heirs—Right of mortgagee as against proprietor.*—Plaintiff, proprietor, sued to recover possession of land held by defendant, mortgagee of Sharafdin, occupancy tenant, who died without heirs two years before suit was brought. *Held* that plaintiff was entitled to a decree, as the interest of the mortgagee in the land could be no greater and last no longer than that of the mortgagor (occupancy tenant) from whom it was derived, and that the mortgagor’s interest having come wholly to an end by reason of his death without heirs, the mortgagee’s interest ceased with it, even if the mortgage was made with the proprietor’s knowledge or was afterwards assented to by him, 79
- Title acquired by purchaser of moveable property at execution sale.*—See “*Execution of decree*” and “*Moveable property.*”

U.

Unregistered mortgage accompanied by possession—Validity or otherwise of, as against a subsequent registered mortgage.—See “*Registration Act, (VIII of 1871) Sections 17 and 49.*”

The references are to the Nos. given to the cases in the "Record."

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Unstamped document—Admission of, in evidence by first Court.—Act XVIII of 1869, Section 18—Power of Appellate Court to interfere.—See "Stamp Act XVIII of 1869, Section 18."

V.

Village proprietor—Childless,—Gift to daughter's son—Raiens.—Found that no custom existed amongst the Raiens of the Hoshiarpur district which precluded a village proprietor without male issue from making a gift of all his property to his daughter's son, ... 37

" " Childless,—Gift to daughter's son of ancestral property—Mahomedan Sheiks.—Found that custom precluded a childless village proprietor from making a gift of his ancestral property to his daughter's son, in the presence of nephews, ... 39

" " Gift of entire estate by, in presence of collaterals.—Found that, by the custom of Mouza Chak Chuhar in the Gujrat district, a childless village proprietor has power to make a gift of his land to whom he pleases, ... 62

" Site—Abadi—Sale of vacant site occupied by proprietor for many years—Consent of co-sharers—Custom.—Where the *abadi* was recorded in the *rajib-ul-arz* as the common property of the village proprietors, held (no special custom being proved), that the fact of one of the proprietors having held a vacant site in the *abadi* gave him no right to sell it to one who was not a member of the village community, without the consent of the co-sharers, ... 24

Voluntary payment.—See "Payment—Voluntary,—"

Valuation—Pre-emption suit—Jurisdiction.—Held by the Full Bench, that suits to enforce a right of pre-emption must as a rule be valued according to the market value of the property in respect of which the right is claimed, for the purpose of determining whether the suit falls within the pecuniary limits of the jurisdiction of a particular Court.

Civil judgment No. 62, *Punjab Record*, 1875, over-ruled.

Held by the Division Bench, where the Tahsildar, having jurisdiction up to Rs. 300, entertained a suit for pre-emption in respect of property the market-value of which was found to be at least Rs. 800; that the suit was beyond the jurisdiction of the Tahsildar, ... 54

Suit for possession of a share in a joint Khata—Court Fees' Act VII of 1870, Section 7, Clauses 5 (b) and (d)—Suit for possession of a share in a joint khata.—Plaintiff sued for possession of 214 kanals 8 marlas of land on the allegation that defendants sold it to him for Rs. 1,500, gave him possession and subsequently dispossessed him. The sale deed conveyed to defendants no specific land, but seven-fifteenths of Khata No. 409, which was a joint Khata comprising 460 kanals 10 marlas of land. The Courts below rejected the plaint on defendant refusing to file additional stamps as on a suit valued in accordance with Section 7, Clause 5 (d) of the Court Fees' Act 1870. Plaintiff appealed, insisting on his right to value the suit at five times the *jumma*, under Section 7, Clause 5 (b), when a preliminary objection was taken that the appeal was barred by Section 12, Clause I.

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Held that the defendants' prayer really was for possession jointly with the defendants of Khata No. 409, with an interest therein to the extent of seven-fifteenths, and that the whole Khata being part of an estate paying annual revenue to Government and recorded in the collector's register as separately assessed with revenue, within the meaning of Clause 5 (b) the value of the suit must be deemed to be five times the revenue payable on the Khata,

W.

Waiver by nearest reversioner.—See "*Reversioner—nearest*,"—"*Waiver by*."

Waiver of right by first pre-emptor in favor of stranger—Subsequent assertion of right against second pre-emptor.—See "*Pre-emption*" and "*Estoppel*."

Weavers of Jullunder—Mahomedan Law—Custom—Daughters—Succession of, —Brothers' sons and grandsons—Ancestral house property.—Found that by the custom among weavers of Jalandhar, in the presence of daughters, brothers' sons and grandsons are not entitled to succeed to ancestral house property,

Widow—alienation by—Suit to set aside—brought by distant reversioner—Waiver by nearest reversioner.—Plaintiffs, distant reversioners, sued to cancel a mortgage made by a Mahomedan widow, with a life interest only in her deceased husband's estate,—*held*, that the suit was not maintainable in the absence of proof that the immediate reversioner had waived or abandoned his rights in favor of plaintiffs.

Civil judgment No. 39 of 1876, *Punjab Record*, commented on and explained,

Widow, Hindu—Maintenance—Suit for arrears of, without rate having been fixed, or demand made—Practice—Held by the Full Bench (FITZPATRICK, PLOWDEN AND SMYTH, JJ.) that a suit by a Hindu widow for arrears of maintenance, in the nature of a suit for breach of an obligation to maintain, will lie notwithstanding that the rate of maintenance has not been fixed by agreement or by decree of Court.

Held also by the Full Bench (FITZPATRICK, PLOWDEN AND SMYTH, JJ.) that where a maintenance allowance has been fixed no demand is required to be proved to sustain a suit for arrears of such allowance; but where no allowance has been fixed, and the suit is one for damages for breach of the obligation to maintain, it may or may not, according to the circumstances of the case, be necessary to prove a demand in order to establish the breach of the obligation.

Held by the Division Bench (LINDSAY AND SMYTH, JJ.) that the amount allowed for the maintenance of a Hindu widow should be in proportion to her wants, that is, her own support and that of those dependent on her, regard being also had in fixing such amount to the means of the estate and the general circumstances of the particular case,

" *Right of, to partition in joint estate.*—See "*Partition*."

Wife—Custody of.—See "*Custody of wife*."

Zamindari—grants of, in Khana Khalee or Government estates, by Settlement officers—Sanction to Settlement—Ratification—Estoppel—Board of Administration Circular 8 of 11th February 1852—Powers of Settlement officers.—By an order of the Settlement officer of the Ambalah

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district dated 24th March 1852, one D, was granted the zamindari of Raiyanwala, and his name was directed to be entered in the proprietary column in the Settlement papers. In pursuance of this order the subordinate Settlement officials recorded D. as proprietor of each field or plot in the village, including two plots now in dispute. The Settlement officer was acting under the authority of Revenue Circular No. 8, dated 11th February 1852, of the Board of Administration, which authorized Settlement officers to grant the zamindari or proprietary rights in *Khana Khalee* or Government estates to private persons.

It did not appear that the Settlement officer had his attention drawn to the fact that, although the entire village of Raiyanwala belonged to Government, there were portions of it which were in the possession of the Canal department, and part of it occupied by the bed of the Western Jamna Canal. All such portions, including even the bed of the canal, were recorded as the property of D. in pursuance of the above order.

It was found that the two plots in dispute formed part of the land then in possession of the Canal department, and that they had been in possession prior to the grant to D. and had continued in possession up to the present date, and had all along used the plots for canal purposes. In 1860 certain letters passed between D.'s representatives and the Commissioner and Deputy Commissioner of Amballa. The Deputy Commissioner heard that negotiations were going on for the sale of D's. estate. He pointed out that they would not be allowed to sell the farms of certain villages which had been held by D. and the terms of which had not then expired, as these were not transferable; and that as regards the villages held by D. in proprietary right, they must sell to the resident cultivators, who had the right of pre-emption. The cultivators were unable to purchase, and eventually D's. representatives sold the village of Raiyanwala to plaintiffs, on which *dakhil kharij* or mutation of names took place.

Held by FITZPATRICK, J., that the grant of the zamindari did not include the two plots in dispute, which were looked upon as part of the canal.

Per SMITH, J., that the Settlement officer exceeded his authority in granting the zamindari without reserving to Government the plots in dispute, as the Circular of the Board of Administration referred only to lands which were used for agricultural purposes, or which might by reclamation or otherwise be used for such purposes, and did not include lands held by Government for public purposes.

Per Curiam.—That the Government in sanctioning the Settlement of the Umballa district did not ratify all the acts of the Settlement officer, including the grant of the entire village of Raiyanwala; and that plaintiffs had failed to show any acts or admissions on the part of the officers of Government since the date of the grant which would have the effect of estopping Government from contesting plaintiffs' claim, ...

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TO

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A.

No.

Abandonment of child—*Indian Penal Code, Section 317*.—Accused, a married woman, eloped leaving her child, 1½ months old, being at the time supported by her milk, in the house of her husband, who was in charge of it jointly with her, who was under the same legal obligation to protect it, and who the Magistrate found was certain, as the mother knew, to take care of it. *Held* by the Chief Court that there was not a "leaving with the intention of wholly abandoning" the child within the meaning of Section 317 of the Indian Penal Code, and that the conviction was therefore unsustainable, ...

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Abatement of appeal. See "*Appeal—Abatement of*."

Act XXII of 1864—Sections 3, 5, 17 and 20—Officiating Cantonment Magistrate with 2nd Class Magisterial powers—Assistant Cantonment Magistrate—Trial of breaches of Cantonment Rules and Regulations.—On 14th September 1877, Major B. was appointed to officiate as Cantonment Magistrate of Sialkot, and invested with the powers of a Magistrate of the 2nd class. On 9th January 1878, he convicted accused of breaches of the Rules and Regulations (Clauses 30 and 32, Chapter III) framed by the Local Government under Section 17, Act XXII of 1864, for the administration of the Sialkot Cantonment, and sentenced him to pay a fine of Rs. 100.

Held that Major B. was only an Assistant Cantonment Magistrate under Section 5, Act XXII of 1864, notwithstanding that he was appointed by the Local Government to act as Cantonment Magistrate, and therefore, that he had no jurisdiction under Section 20 of the Act to try the accused for breaches of the Cantonment Rules,

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Act I of 1871. See "*Cattle Trespass Act I of 1871*."

Act X of 1871. See "*Excise Act*."

Act I of 1872. See "*Evidence Act I of 1872*."

Act IV of 1872—Sections 48 and 50—Tirni or Rakh rules of Jhang district—Want of publication—Conviction for breach of rules.—Certain Tirni rules for the Rakhs in the Jhang district were framed under Sections 48 and 50 of Act IV of 1872, and sanctioned by the Punjab Government in letter No. 1203, dated 17th August 1872 to address of Secretary to Financial Commissioner, but were not published in the *Punjab Gazette* as required by Section 50. *Held* that, as no publication took place, the rules were wanting in the force of law, and that a conviction under Section 50 for a breach of the said rules was accordingly invalid, ...

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The references are to the Nos. given to the cases in the "Record."

Act IV of 1872, Section 50, Clauses 1 and 2—Penalty—Breach of Opium rules.—
Clause 2 of Section 50, Act IV of 1872, having been repealed by
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that section, ...

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Act XI of 1872—Section 3, Clause 2 and Section 9—Native State—Native Indian
subjects—Amenability of, to British Courts in respect to offences com-
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frontier into independent territory and there murdered one K. M.
Held that D. G. and S. G. could be tried for murder by the British
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Indian subjects of Her Majesty are amenable to the British Courts
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Act XVII of 1877, Sections 15 and 25—Powers of superintendence of Chief Court
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Alternative imprisonment. See "Imprisonment—Alternative."

Appeal—Abatement of—Death of appellant—A. S. appealed to the Chief Court
against his conviction by the Deputy Commissioner of Jhelum.
While the appeal was pending A. S. died. Held that the death of
A. S. caused the appeal to abate, ...

" European British subject—Criminal Procedure Code, Section 84.—The
accused at his trial did not claim to be dealt with as an European
British subject, but claimed to appeal to the Chief Court as such.
Held, under Section 84 Criminal Procedure Code, that accus-
ed had waived his privilege as an European British subject, and,
therefore, that accused was not entitled to appeal to the Chief
Court, ...

" Right of, after enhancement of punishment by Chief Court.—A. and M. R.
were convicted under Section 498 Indian Penal Code, and sentenced
by the Board of Honorary Magistrates at Amritsar, exercising 2nd
Class powers, to pay fines of Rs. 25 and Rs. 5 respectively, but
preferred no appeal. The Magistrate of the District reported the
case under Section 296, Criminal Procedure Code, and the Chief
Court enhanced the punishment by six months' rigorous imprison-
ment. Thereupon A. preferred an appeal to the Chief Court against
the conviction.

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Appellate Court—Power of—to order re-trial of one of several persons who have
been jointly tried and convicted—Admissibility of evidence of other
accused upon such re-trial—Evidence Act, Section 118.—Held that,
where two persons are jointly charged and tried under the provisions
of Section 458 of the Criminal Procedure Code and are convicted,
and a new trial is afterwards ordered of one of such persons by the
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Bigamy—Indian Penal Code, Section 494—Marriage by wife after absence of husband for four years.—The doctrine of a certain school of Muhammadan divines in regard to the competency of a woman to marry again after the absence of her husband for four years, does not entitle a woman so remarrying to the benefit of the exception to Section 494 of the Indian Penal Code, ...

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Bond *fide* purchaser—Stolen property—Order for disposal of—Criminal Procedure Code (Act X of 1872), Section 418.—In a summary proceeding under Section 418 of the Criminal Procedure Code, where stolen property is in the possession of a *bond fide* purchaser, the proper order for a Magistrate to pass is to leave the property in the purchaser's possession, leaving the complainant to take such steps as he may think proper to establish his title as owner and recover possession from the purchaser, ...

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British India—Act I of 1868, Section 2, clause 8—Upper Tanawal.—Held that, Upper Tanawal is an integral part of British India within the meaning of Clause 8 Section 2 Act I of 1868, and therefore, the Sessions Judge of Peshawar has jurisdiction to try offences committed to him for trial from that part of the Hazara district, ...

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C.

Cantonment Magistrate (Offg.).—With 2nd Class Magisterial powers.—Act XXII of 1864, Sections, 3, 5, 17 and 20—Officiating Cantonment Magistrate with 2nd Class Magisterial powers—Assistant Cantonment Magistrate—Trial of breaches of Cantonment Rules and Regulations.—On 14th September 1877, Major B, was appointed to officiate as Cantonment Magistrate of Sialkot, and invested with the powers of a Magistrate of the 2nd class. On 9th January 1878, he convicted accused of breaches of the Rules and Regulations (Clauses 30 and 32, Chapter III) framed by the Local Government under Section 17, Act XXII of 1864, for the administration of the Sialkot Cantonment, and sentenced him to pay a fine of Rs. 100.

Held that Major B. was only an Assistant Cantonment Magistrate under Section 5, Act XXII of 1864, notwithstanding that he was appointed by the Local Government to act as Cantonment Magistrate, and therefore that he had no jurisdiction under Section 20 of the Act to try the accused for breaches of the Cantonment Rules, ...

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Cattle Trespass Act I of 1871, Section 22—Compensation for wrongful seizure.—*Held*, that the award under Section 22, Act I of 1871, should be by way of reasonable compensation for loss caused by seizure and detention of cattle, and not by way of penalty on the person complained against, or of an award of general damages to the complainant, ...

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” ” ” Compensation for wrongful seizure—*Fine.*—Accused was convicted and sentenced under Section 22, Act I of 1871, to pay a fine of Rs. 25, out of which Rs. 12 was ordered to be paid to complainant as compensation for loss and expenses in-

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Compensation — <i>Award of, to husband whose wife has been enticed away</i> .— <i>Grounds for award of</i> .— <i>Criminal Procedure Code, Section 308</i> .— <i>Held</i> by Fitzpatrick and Plowden, JJ., that compensation may be awarded, under Section 308 Act X of 1872, to a husband whose wife has been enticed away with criminal intent.		
<i>Per Fitzpatrick, J.</i> —Where the case is one in which the complainant would be entitled to recover pecuniary damages, if he brought a civil action, the offence is one which can "be compensated in money" within the meaning of Section 308.		
<i>Per Plowden, J.</i> —Compensation may be awarded for any injury caused by the offence complained of, when such injury can be compensated in money, and the injury is one in respect of which damages would be recoverable in a civil action.		
<i>Held</i> further, by Lindsay and Plowden, JJ., that the specific ground upon which compensation is claimed and awarded should be stated by the Court, in order that the accused person may have an opportunity of contesting both his liability and the amount, ...		10
" " <i>Criminal Procedure Code Section 308</i> .—Accused was convicted of enticing away complainant's wife with criminal intent, Section 498 Indian Penal Code; and the fine imposed was awarded to complainant in compensation for the dishonour caused to him by the offence. <i>Held</i> by PLOWDEN and SMYTH, JJ. (LINDSAY, J., dissenting) that the award of compensation was legal under Section 308, Criminal Procedure Code, ...		14
" " <i>for wrongful seizure of Cattle</i> .— <i>Cattle Trespass Act I of 1871, Section 22</i> .— <i>Held</i> , that the award under Section 22, Act I of 1871, should be by way of reasonable compensation for loss caused by seizure and detention of cattle, and not by way of penalty on the		

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" " <i>illegal seizure of Cattle.—Cattle Trespass Act I of 1871, Section 22—Damage to reputation.</i> —Section 22, Act I of 1871, does not contemplate the award of compensation for damage to the reputation of the complainant, nor does it warrant the infliction of a penalty upon the person complained against, in addition to the compensation awarded, ...	37
<i>Complaint—Criminal Procedure Code, Section 142—Order by Commissioner for inquiry.</i> —Accused, a petition-writer, wrote for presentation to the Commissioner's Court a Memorandum of Appeal in which he alleged that the order appealed from was based on "conjectural grounds," and that a certain statement made in the order was "utterly false." The Commissioner directed the Deputy Commissioner to pass a proper order in the matter, whereupon the Deputy Commissioner treated the case as one under Section 500 Indian Penal Code, and after enquiry convicted accused. <i>Held</i> that the conviction was illegal, no complaint having been made to the Deputy Commissioner within the meaning of Section 142 of the Criminal Procedure Code, ...	15
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<i>Criminal Procedure Code—(Act X of 1872) Sections 66, 330 and 418—Jurisdiction—Criminal Court—Trial of subject of Native State for acts done in that State abetting an offence in British territory—Commission for examination of witness in Foreign territory—Disposal of property stolen in British but seized in Foreign territory.</i> — <i>Held</i> , that a Magistrate cannot, under Section 330, Act X of 1872, issue a commission for the examination of a witness in Foreign territory. <i>Held</i> also, that a subject of a Native State, who, by acts done in that State, and not in British territory, abets the commission of an offence in British territory, is not liable to be punished, under the Penal Code, by the Courts of British India. <i>Held</i> also, that a subject of a Native State is not liable to be punished under the Penal Code by a Court in British India for acts committed in British India, he being at the time of such commission in Foreign territory, even if he afterwards be in British India. <i>Held</i> also, that a Magistrate has jurisdiction under Section 418, Act X of 1872, to deal with property stolen in British territory, notwithstanding that it may be seized in Foreign territory and brought into British Territory by the police, ...	20

The references are to the Nos. given to the cases in the "Record."

Criminal Procedure Code—Section 84—E. B. subject—Appeal.—The accused at his trial did not claim to be dealt with as an European British subject, but claimed to appeal to the Chief Court as such. *Held* under Section 84 Criminal Procedure Code, that accused had waived his privilege as an European British subject, and, therefore, that accused was not entitled to appeal to the Chief Court, ...

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Section 142—Complaint—Order by Commissioner for enquiry—Indian Penal Code, Section 500—Defamation—Memorandum of Appeal.—Accused, a petition-writer, wrote for presentation to the Commissioner's Court a Memorandum of Appeal in which he alleged that the order appealed from was based on "conjectural grounds," and that a certain statement made in the order was "utterly false." The Commissioner directed the Deputy Commissioner to pass a proper order in the matter, whereupon the Deputy Commissioner treated the case as one under Section 500 Penal Code, and after enquiry convicted accused. *Held* that the conviction was illegal, no complaint having been made to the Deputy Commissioner within the meaning of Section 142 of the Criminal Procedure Code, ...

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(Act X of 1872), Sections 195 and 196—Commitment to Sessions—Ambiguous finding.—A Magistrate committed a case to the Sessions, recording in his grounds for committal, that the evidence was insufficient, being purely conjectural, but that as the charge was a serious one, and there was a certain amount of doubt regarding the innocence of the accused, he committed him to take his trial. *Held* that the Magistrate, holding the views expressed, erred in law in committing the accused to take his trial, ...

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Sections 297, 518 and 520—Powers of Revision—Non-Judicial proceeding under 518. Punjab Courts' Act (XVII) of 1877, sections 15 and 25—Chief Court powers of superintendence—Criminal Courts.—Under section 518 Act X of 1872 the Magistrate of the district of Jullundur directed Mussumat Faizunnissa and her mother, to remain in the Haveli in which they then were, assuring to them all pre-existing privileges. He further directed that the brothers of M. F. should leave the premises and take up their abode elsewhere, pending the result of an appeal from the decree of the Judicial Assistant declaring the right of M. F. to leave her place of residence and marry without the consent of her brothers, and that a strong Police guard, paid for by the brothers, should keep guard over the outer gate of the Haveli, with directions to permit certain persons to come and go, but under no circumstances to allow the brothers or one M. H. K. the right of entrance.

Held that the Magistrate had no jurisdiction to make the order under section 518, Criminal Procedure Code.

Held further, that section 297, Criminal Procedure Code did not empower the Chief Court to revise the order made under section 518, even though the order was manifestly in excess of the authority of the Magistrate professing to act under that section. When a Magistrate records a proceeding and issues an order under section 518, intending and professing to act not merely under color of that

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section, but in an honest, though mistaken, belief that he has power to act under it, the order made by him is an order made under section 518 within the meaning of section 520, and is therefore not a Judicial proceeding. Such an order does not become a Judicial proceeding and order, because although it is in excess of the Magistrate's authority under section 518 and made without any lawful authority whatever, it is yet a proceeding and order held and made by a Magistrate.	
<i>Held</i> further, that the Chief Court had no power, under its powers of general superintendence, under section 25 of Act XVII of 1877, to revise the order of the Magistrate, as that section gave the Court no power of general superintendence over Criminal Courts,	33
<i>Criminal Procedure Code, (Act X of 1872) Section 306—Pregnancy of convicted woman—Capital Sentence—Commutation.</i> —Under section 306, Act X of 1872, ascertained pregnancy renders it compulsory to postpone the execution of a sentence of death passed upon a woman, and may be a reason for commutation by the High Court; but a capital sentence should be pronounced on a conviction for murder, notwithstanding pregnancy, although the execution of the sentence should be deferred,	34
" <i>Section 308.—Compensation.—Award of, to husband whose wife has been enticed away.—Grounds for award of.</i> — <i>Held</i> by Fitzpatrick and Plowden, JJ., that compensation may be awarded under Section 308, Act X of 1872, to a husband whose wife has been enticed away with criminal intent.	
<i>Per</i> Fitzpatrick, J.—Where the case is one in which the complainant would be entitled to recover pecuniary damages, if he brought a civil action, the offence is one which can "be compensated in money" within the meaning of Section 308.	
<i>Per</i> Plowden, J.—Compensation may be awarded for any injury caused by the offence complained of, when such injury can be compensated in money, and the injury is one in respect of which damages would be recoverable in a civil action.	
<i>Held</i> further, by Lindsay and Plowden, JJ., that the specific ground upon which compensation is claimed and awarded should be stated by the Court, in order that the accused person may have an opportunity of contesting both his liability and the amount,	10
" <i>Section 308—Compensation—Award of, to husband whose wife has been enticed away.</i> —Accused was convicted of enticing away complainant's wife with criminal intent, Section 498 Indian Penal Code; and the fine imposed was awarded to complainant in compensation for the dishonour caused to him by the offence. <i>Held</i> by PLOWDEN and SMYTH, JJ. (LINDSAY, J., dissenting) that the award of compensation was legal under Section 308, Criminal Procedure Code,	14
" <i>Section 309—Indian Penal Code, section 64—Fine—Alternative imprisonment—Act I of 1868.</i> — <i>Held</i> that, imprisonment in default of payment of fine, under section 64, Indian Penal Code, cannot legally be awarded on conviction for an offence punishable under a special Act passed before Act I of 1868.	

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- Held* further, that neither section 64, Indian Penal Code, nor section 309, Criminal Procedure Code, renders it imperative to award imprisonment in default of payment of fine, ... 30
- Criminal Procedure Code—Section 310—Whipping—Punishment of, when, to be inflicted.*—Accused was convicted by the magistrate of the district and sentenced to 7 years' rigorous imprisonment. The Sessions Judge to whom the case was referred for confirmation modified the sentence to one of one year's rigorous imprisonment and "30 stripes, to be administered when leaving jail." *Held* that the order of the Sessions Judge directing the whipping to be administered at the time of release was illegal.
- Under section 310, Act X of 1872, it is imperative to carry out a sentence of whipping, in addition to imprisonment, immediately on the expiry of 15 days from the date on which it was passed, unless an appeal be made within that time, ... 31
- " *(Act X of 1872) Section 327.—Evidence Act, (I of 1872,) Sections 30 and 133,—Admissibility in evidence of confession made by one of two persons accused of the same offence, who is tried separately and dies before the trial of the other.* In 1873, J. and S. were concerned in the murder of one P; J. absconded, but S., having been arrested, was placed on his trial in that year. S. in his defence at the Sessions trial made a statement that J. admitted to him that he had committed the murder. In 1877, J. having been captured was placed on his trial. S. having meanwhile died, the Sessions Judge made use of the statement of S. made at his trial in 1873, as evidence against J.
- Held* that the statement of S. was not admissible in evidence against J., either under Section 327, Act X of 1872, or Sections 30 and 133 of the Evidence Act, I of 1872, ... 13
- " *(Act X of 1872), Section 418.—Order for disposal of stolen property.—Bond-fide purchaser.*—In a summary proceeding under Section 418 of the Criminal Procedure Code, where stolen property is in the possession of a *bond-fide* purchaser, the proper order for a Magistrate to pass is to leave the property in the purchaser's possession, leaving the complainant to take such steps as he may think proper to establish his title as owner and recover possession from the purchaser, ... 21
- " *(Act X of 1872) Section 458—Joint trial of accused persons.—Power of Appellate Court to order re-trial of one of several persons who have been jointly tried and convicted.—Admissibility of evidence of other accused upon such re-trial.—Evidence Act, Section 118.*
- Held* that, where two persons are jointly charged and tried under the provisions of Section 458 of the Criminal Procedure Code and are convicted, and a new trial is afterwards ordered of one of such persons, the other person can upon such trial be lawfully examined as a witness, ... 23
- " *Chapter XXXVIII, Sections 504 to 506—Security for good behaviour—Personal recognizance of bad character—Bond of surety—Recovery of amount of personal recognizance from bad character.*

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Held by Lindsay and Fitzpatrick, JJ., that a Magistrate can legally require a person convicted under Sections 505 and 506 to furnish a personal recognizance in addition to the security for his good behaviour.

Held further, that when there is only one surety he should bind himself only to the same amount as the principal, and when there are several sureties they should bind themselves jointly and severally for the same amount.

Held further, by Lindsay, J., that there is no provision in Chapter XXXVIII of the Code of Criminal Procedure, for the recovery of the sum mentioned in the bond entered into by the bad character himself, his surety being responsible for that sum, ...

Criminal Procedure Code—Section 536—Award of separate maintenance—Incompatibility of temper—Second wife.—Held that incompatibility of temper and the presence of a second wife in the house, are legally insufficient to support an award of separate maintenance under Section 536, Act X of 1872, ...

Criminal Trespass.—Indian Penal Code, Section 447—Accused for several years cultivated land under a lease from the Forest Department which was renewed annually. During the period of his occupation accused built a dwelling house and made other improvements. The Forest Department requiring the land for conservation, accused was served with notice of ejectment, and he was told to remove the materials of his house. Accused refused to relinquish the land until payment of compensation for his improvements, whereupon he was criminally prosecuted by the Forest Department, and convicted by the Tahsildar of Kharian of criminal trespass under Section 447, Indian Penal Code. *Held*, that the conviction was illegal.

In order to sustain a conviction for criminal trespass it must be shown that the property was in the possession of some other person than the alleged trespasser, ...

D.

Death of Appellant.—See "Appeal—Abatement of."

Doubt—element of—Evidence Act I of 1872, Section 3. Fact when held to be proved—Peshawar murder cases—True charges against the guilty added to by utterly false ones against the innocent.—In dealing with Peshawar murder cases there may be an element of doubt of a scarcely tangible character, which is often felt when dealing with the evidence of Pathans of the Peshawar district, owing to their proneness to exaggerate and add to true charges against the guilty, utterly false ones against the innocent; but it is not this kind of doubt which should lead a Court to acquit an accused person.

The degree of certainty which must be arrived at before a fact is said to be proved is that described in Section 3 of the Evidence Act, ...

"Dunds" or pounds—Theft of fish from. See "Theft" and "I. P. C. Sections 378 and 379."

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The references are to the Nos. given to the cases in the "Record."

E.

Element of doubt. See "*Doubt—element of.*"

Emasculation—Grievous hurt caused by a man to himself—Indian Penal Code, Sections 309, 320 and 325.—Accused emasculated himself and was convicted under Section 309, Indian Penal Code.—*Held* that the conviction under Section 309, was illegal.

Held further, that accused could not be convicted of causing grievous hurt to himself under Section 325, Indian Penal Code, ...

Enhancement of punishment by Chief Court—Right of appeal after. See "*Appeal.*"

E. B. subject—Appeal by. See "*Appeal.*"

Evidence Act I of 1872, Section 3—Fact when held to be proved—Element of doubt.—

In dealing with Peshawar murder cases there may be an element of doubt of a scarcely tangible character, which is often felt when dealing with the evidence of Pathans of the Peshawar district, owing to their proneness to exaggerate and add to true charges against the guilty, utterly false ones against the innocent; but it is not this kind of doubt which should lead a Court to acquit an accused person.

The degree of certainty which must be arrived at before a fact is said to be proved is that described in Section 3 of the Evidence Act, ...

" " *Sections 30 and 133—Admissibility in evidence of confession made by one of two persons accused of the same offence, who is tried separately and dies before the trial of the other.*—In 1873, J. and S. were concerned in the murder of one P.; J. absconded, but S., having been arrested, was placed on his trial in that year. S. in his defence at the sessions trial made a statement that J. admitted to him that he had committed the murder. In 1877, J. having been captured was placed on his trial. S. having meanwhile died, the Sessions Judge made use of the statement of S. made at his trial in 1873, as evidence against J.

Held that the statement of S. was not admissible in evidence against J., either under Section 327, Act X of 1872, or Sections 30 and 133 of the Evidence Act, I of 1872, ...

" " *Section 118—Re-trial of one of several persons who have been jointly tried and convicted—Admissibility of evidence of other accused upon such re-trial.*—*Held* that, where two persons are jointly charged and tried under the provisions of Section 458 of the Criminal Procedure Code and are convicted, and a new trial is afterwards ordered of one of such persons, the other person can upon such trial be lawfully examined as a witness, ...

Excise Act X of 1871, Sections 58, 62 and 70—Breach of Opium Law—Liability of master and servant.—R., brother and servant of S., a licensed vendor of opium, sold to one A., opium in excess of the quantity allowed by law. On the conviction of R. under Section 70 of Act X of 1871, and of S. under Section 58,—

Held, that R. was not liable under Section 70, but could be convicted under Section 62, as he was not protected in the case of an unlawful sale by the plea of his master's authority.

No.

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The references are to the Nos. given to the cases in the "Record."

No.

Held further, (SMYTH, J. doubting) that the conviction of S. under Section 58 was good in law.

Per PLOWDEN, J.—A licensed retail vendor of opium is liable to penalties under Section 58, Act X of 1871, for a sale by his servant of an unlawful quantity of opium. It is unnecessary to show that the master knew of or authorised the particular sale. It is enough to show a general authority to the servant to sell on his master's behalf.

Absence of such knowledge and authority is ground for a mitigated penalty, ...

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Excise Act X of 1871, Sections 63 and 65—Licensed retail vendor—Agent of—Transferee of—Unlawful possession of unauthorized quantity of opium or charas.—Importation of foreign opium or charas without a pass.—The accused P. was convicted under Section 65 of the Excise Act, X of 1871, for having in his possession 10 seers of opium and 16 seers of charas, smuggled from Faridkot territory into Ferozepore, he not being a licensed vendor. P. pleaded that he and his brother M. were acting as agents for the licensed vendors, K. and R. C. The Magistrate held that K. and R. C. were farmers under Section 25, Act X of 1871; that it was not proved that P. and M. were subordinate license holders as no information had been given to the Collector under Section 28; that P. smuggled opium and charas from Faridkot territory without a pass, and, therefore, that P. was guilty under Sections 65. The Sessions Judge (Commissioner) on appeal found that the license held by K. and R. C. was not transferable; that no license had been granted to P.; and therefore, that he could not be considered a licensed vendor.

Held that the question for decision was whether the opium and charas were in the possession of P. on his own account or as agent for the licensed vendors; and that, if in the possession of P. as agent, he was not liable to punishment under Section 65, Act X of 1871.

The license granted to a licensed retail vendor of drugs is not transferable, but such vendor may employ agents and servants in his own business, and if a transfer be made in good faith the offence of the transferee, in being in possession of unauthorized quantities of opium and drugs, is not one calling for severe punishment.

Held further, that a licensed vendor cannot be convicted under Sections 63 and 65, Act X of 1871, for importing charas or opium from foreign territory without a pass, ...

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F.

Fine—Excessive—Indian Penal Code, Section 63.—A fine should be fixed with due regard to the circumstances of the case in which it is imposed, and the condition in life of the offender, and not with the object of extending to the utmost possible limits the term of imprisonment to be awarded by the Magistrate trying a case, ...

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Fish—Theft of, from "Dunds" or ponds. See "Theft" and "Indian Penal Code, Sections 378 and 379."

Foreign Territory—trial of subject of Native State for acts done in that State abetting an offence in British Territory—Commission for examination of wit-

The references are to the Nos. given to the cases in the "Record."

ness in—*Disposal of property stolen in British but seized in—Jurisdiction of British Criminal Courts—Criminal Procedure Code, Sections 66, 330 and 418.—Held*, that a Magistrate cannot, under Section 330, Act X of 1872, issue a commission for the examination of a witness in Foreign Territory.

Held also, that a subject of a Native State, who, by acts done in that State, and not in British Territory, abets the commission of an offence in British Territory, is not liable to be punished under the Penal Code, by the Courts of British India.

Held also, that a subject of a Native State is not liable to be punished under the Penal Code by a Court in British India for acts committed in British India, he being at the time of such commission in Foreign Territory, even if he afterwards be in British India.

Held also, that a Magistrate has jurisdiction under Section 418, Act X of 1872, to deal with property stolen in British Territory, notwithstanding that it may be seized in Foreign Territory and brought into British Territory by the Police, ...

No.

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G.

Grievous Hurt—caused by a man to himself—Emasculation—Indian Penal Code, Sections 309, 320 and 325.—Accused emasculated himself and was convicted under Section 309, Indian Penal Code.—Held that the conviction under Section 309, was illegal.

Held further, that accused could not be convicted of causing grievous hurt to himself under Section 325, Indian Penal Code, ...

Guardianship—"Lawful guardianship"—Indian Penal Code—Sections 361 and 366—Kidnapping—Minor—D. S., had two wives, N. and J., by the latter of whom he had two daughters. In February 1876 he went with his wife N. to a marriage in another village, leaving J. and her two daughters at home. During the temporary absence of D. S., J. removed her two daughters to the house of her brother-in-law M. and married the elder girl (aged 8 years) to one G., with the assistance of three other persons.

Held that the word "woman" in Section 366, Indian Penal Code, included a minor female.

Held further, that there was a kidnapping from the lawful guardianship of D. S. within the meaning of Sections 361 and 366, Indian Penal Code, notwithstanding the consent of the mother J. to the girl's removal.

Per SMYTH, J.—Because the girl, during the temporary absence of the father D. S. continued in his possession and under his control, as her lawful guardian, and was not under the guardianship of her mother J.

Per PLOWDEN, J.—Because the consent of a mere custodian in breach of the trust reposed by the person from whom the right to custody is derived, is not the consent of the guardian in whose keeping the minor still continues through the custodian, ...

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The references are to the Nos. given to the cases in the "Record."

No.

I.

- Imprisonment—Alternative—in default of payment of fine.—Indian Penal Code, Section 64—Criminal Procedure Code, Section 309—Held that, imprisonment in default of payment of fine, under Section 64, Indian Penal Code, cannot legally be awarded on conviction for an offence punishable under a Special Act passed before Act I of 1868.*
- Held further, that neither Section 64, Indian Penal Code, nor Section 309, Criminal Procedure Code, renders it imperative to award imprisonment in default of payment of fine, ... 30*
- Indian Penal Code, Section 63—Fine—Excessive—Infliction of, for purpose of increasing term of imprisonment.—A fine should be fixed with due regard to the circumstances of the case in which it is imposed, and the condition in life of the offender, and not with the object of extending to the utmost possible limits the term of imprisonment to be awarded by the Magistrate trying a case, ... 18*
- " " Section 64—Criminal Procedure Code, Section 309—Fine—Alternative imprisonment—Act I of 1868.—Held that, imprisonment in default of payment of fine, under Section 64, Indian Penal Code, cannot legally be awarded on conviction for an offence punishable under a Special Act passed before Act I of 1868.*
- Held further, that neither Section 64, Indian Penal Code, nor Section 309, Criminal Procedure Code, renders it imperative to award imprisonment in default of payment of fine, ... 30*
- " " Sections 73 and 74—Solitary confinement—month.—Accused was sentenced to 4 months' rigorous imprisonment, of which one month to be in solitary confinement, and a fine of Rs. 25 or 1½ months further rigorous imprisonment in default. Held that the sentence of one month's solitary confinement was legal, notwithstanding that accused could not lawfully, under Section 74, Indian Penal Code, be subjected to more than 28 days solitary confinement, if the imprisonment continued for only four months.*
- Held further, that for the purpose of executing a sentence of solitary confinement, a month signifies a period equal to the average duration of a calendar month, that is (disregarding fractions), thirty days, ... 7*
- Indian Penal Code, Section 75—Punishment—Transportation for life.—Under Section 75 of the Indian Penal Code, a Court is competent to sentence the accused to transportation for life, or double the amount of punishment to which he would otherwise have been liable, ... 26*
- " Sections 309, 320 and 325—Emasculation—Grievous hurt caused by a man to himself.—Accused emasculated himself and was convicted under Section 309, Indian Penal Code. Held that the conviction under Section 309 was illegal.*
- Held further, that accused could not be convicted of causing grievous hurt to himself under Section 325, Indian Penal Code, ... 22*
- " Section 317—Abandonment of child.—Accused, a married woman, eloped leaving her child, 1½ months old, being at the time supported by her milk, in the house of her husband, who was in charge of it jointly with her, who was under the same legal obliga-*

The references are to the Nos. given to the cases in the "Record."

- No.
- tion to protect it, and who the Magistrate found was certain, as the mother knew, to take care of it. *Held* by the Chief Court that there was not a "leaving with the intention of wholly abandoning" the child within the meaning of Section 317 of the Indian Penal Code, and that the conviction was therefore unsustainable, ...
- Indian Penal Code, Sections 361 and 366—Kidnapping—Minor—Lawful guardianship*,—D. S. had two wives, N. and J., by the latter of whom he had two daughters. In February 1876 he went with his wife N. to a marriage in another village, leaving J. and her two daughters at home. During the temporary absence of D. S., J. removed her two daughters to the house of her brother-in-law M., and married the elder girl (aged 8 years) to one G., with the assistance of three other persons.
- Held* that the word "woman" in Section 366, Indian Penal Code, included a minor female.
- Held* further, that there was a kidnapping from the lawful guardianship of D. S. within the meaning of Sections 361 and 366, Indian Penal Code, notwithstanding the consent of the mother J. to the girl's removal.
- Per* SMYTH, J.—Because the girl, during the temporary absence of the father D. S. continued in his possession and under his control, as her lawful guardian, and was not under the guardianship of her mother J.
- Per* PLOWDEN, J.—Because the consent of a mere custodian in breach of the trust reposed by the person from whom the right to custody is derived, is not the consent of the guardian in whose keeping the minor still continues through the custodian, ...
- " *Sections 378 and 379—"Dunds" or ponds—Theft of fish from—possession*.—The accused caught fish in the Sundri dund, a sheet of water five miles long by 20 feet broad. The right of fishing in this and other dunds had been leased to a contractor by the Government. *Held* that the fish in the pond were not in the possession of any person within the meaning of Section 378, Indian Penal Code, and could not therefore be the subject of theft, ...
- " *Section 425.—Mischief—Cutting trees for a public purpose*.—The accused A. C. and another, members of the Municipal Committee of Jalalpur, permitted a tree within Municipal limits to be cut for a public purpose, against the order of the Municipal Committee as a body. *Held* that accused had not committed the offence of mischief as defined in Section 425 of the Indian Penal Code, ...
- " *Section 447—Criminal Trespass*.—Accused for several years cultivated land under a lease from the Forest Department which was renewed annually. During the period of his occupation accused built a dwelling house and made other improvements. The Forest Department requiring the land for conservation accused was served with notice of ejectment, and he was told to remove the materials of his house. Accused refused to relinquish the land until payment of compensation for his improvements, whereupon he was criminally prosecuted by the Forest Department, and con-
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The references are to the Nos. given to the cases in the "Record."

- victed by the Tahsildar of Kharian of criminal trespass under Section 447, Indian Penal Code. *Held*, that the conviction was illegal. No.
- In order to sustain a conviction for criminal trespass it must be shown that the property was in the possession of some other person than the alleged trespasser, ... 28
- Indian Penal Code, Section 494—Bigamy—Marriage by wife after absence of husband for four years.*—The doctrine of a certain school of Muhammadan divines in regard to the competency of a woman to marry again after the absence of her husband for four years does not entitle a woman so remarrying to the benefit of the exception to Section 494 of the Indian Penal Code, ... 27
- J.**
- Joint trial and conviction of several accused persons—Power of appellate Court to order re-trial of one—See "Appellate Court" and "Criminal Procedure Code, Section 458."*
- Jurisdiction—Act XI of 1872—Section 3, clause 2 and Section 9.—Native State—Native Indian subjects—Amenability of, to British Courts in respect to offences committed beyond India.*—D. G. and S. G., British subjects, crossed the frontier into independent territory and there murdered one K. M. *Held* that D. G. and S. G. could be tried for murder by the British Courts under Sections 9 and 3, clause 2, Act XI of 1872. Native Indian subjects of Her Majesty are amenable to the British Courts in respect to offences committed by them in all territories beyond India, ... 29
- Jurisdiction—Criminal Court—Criminal Procedure Code (Act X of 1872) Sections 66 and 418—Jurisdiction—Trial of subject of Native State for acts done in that State abetting an offence in British Territory.—Disposal of property stolen in British but seized in Foreign Territory.—Held* that a subject of a Native State, who, by acts done in that State, and not in British Territory, abets the commission of an offence in British Territory, is not liable to be punished under the Penal Code, by the Courts of British India.
- Held* also, that a subject of a Native State is not liable to be punished under the Penal Code by a Court in British India for acts committed in British India, he being at the time of such commission in Foreign Territory, even if he afterwards be in British India.
- Held* also, that a Magistrate has jurisdiction under Section 418, Act X of 1872, to deal with property stolen in British Territory, notwithstanding that it may be seized in Foreign Territory and brought into British Territory by the Police, ... 20
- K.**
- Kidnapping—Minor—Lawful guardianship—Indian Penal Code, Sections 361 and 366.*—D. S. had two wives, N. and J., by the latter of whom he had two daughters. In February 1876 he went with his wife N. to a marriage in another village, leaving J. and her two daughters at home. During the temporary absence of D. S., J. removed her two

The references are to the Nos. given to the cases in the "Record."

No.

daughters to the house of her brother-in-law, M. and married the elder girl (aged 8 years) to one G., with the assistance of three other persons.

Held that the word "woman" in Section 366, Indian Penal Code, included a minor female.

Held further, that there was a kidnapping from the lawful guardianship of D. S. within the meaning of Sections 361 and 366, Indian Penal Code, notwithstanding the consent of the mother J. to the girl's removal.

Per SMYTH, J.—Because the girl, during the temporary absence of the father D. S., continued in his possession and under his control, as her lawful guardian, and was not under the guardianship of her mother J.

Per PLOWDEN, J.—Because the consent of a mere custodian in breach of the trust reposed by the person from whom the right to custody is derived, is not the consent of the guardian in whose keeping the minor still continues through the custodian, ...

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L.

Lawful guardianship—See "Guardianship."

Licensed retail vendor of opium or charas, under Excise Act X of 1871.—Agent of—Transferee of—Unlawful possession of unauthorized quantity of opium or charas.—Importation of foreign opium or charas without a pass.—The accused P. was convicted under Section 65 of the Excise Act, X of 1871, for having in his possession 10 seers of opium and 16 seers of charas, smuggled from Faridkot territory into Ferozepore, he not being a licensed vendor. P. pleaded that he and his brother M. were acting as agents for the licensed vendors, K. and R. C. The Magistrate held that K. and R. C. were farmers under Section 25, Act X of 1871; that it was not proved that P. and M. were subordinate license holders as no information had been given to the Collector under Section 28; that P. smuggled opium and charas from Faridkot territory without a pass, and therefore, that P. was guilty under Section 65. The Sessions Judge (Commissioner) on appeal found that the license held by K. and R. C. was not transferable; that no license had been granted to P.; and therefore, that he could not be considered a licensed vendor.

Held that the question for decision was whether the opium and charas were in the possession of P. on his own account or as agent for the licensed vendors; and that, if in the possession of P. as agent, he was not liable to punishment under Section 65, Act X of 1871.

The license granted to a licensed retail vendor of drugs is not transferable, but such vendor may employ agents and servants in his own business, and if a transfer be made in good faith the offence of the transferee, in being in possession of unauthorized quantities of opium and drugs, is not one calling for severe punishment.

Held further, that a licensed vendor cannot be convicted under Sections 63 and 65, Act X of 1871, for importing charas or opium from foreign territory without a pass, ...

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The references are to the Nos. given to the cases in the "Record."

No.

M.

Maintenance—*separate award of.*—*Criminal Procedure Code, Section 536.*—*Held* that incompatibility of temper and the presence of a second wife in the house, are legally insufficient to support an award of separate maintenance under Section 536, Act X of 1877, ...

Marriage—*by wife after absence of husband for 4 years.*—*Duty of Criminal Court to decide question of.*—*Indian Penal Code, Section 494.*—*Bigamy.*—A Criminal Court is bound to decide the question of marriage when it is essential to the decision of the question whether an offence has been committed or not.

The doctrine of a certain school of Muhammadan divines in regard to the competency of a woman to marry again after the absence of her husband for four years does not entitle a woman so remarrying to the benefit of the exception to Section 494 of the Indian Penal Code, ...

Master and Servant—*Breach of Opium Law.*—*Act X of 1871, Sections 58, 62 and 70.*—R., brother and servant of S., a licensed vendor of opium, sold to one A., opium in excess of the quantity allowed by law. On the conviction of R. under Section 70 of Act X 1871, and of S. under Section 58, ...

Held that R. was not liable under Section 70, but could be convicted under Section 62, as he was not protected in the case of an unlawful sale by the plea of his master's authority.

Held further, (SMYTH, J. doubting), that the conviction of S. under Section 58 was good in law.

Per PLOWDEN, J.—A licensed retail vendor of opium is liable to penalties under Section 58, Act X of 1871, for a sale by his servant of an unlawful quantity of opium. It is unnecessary to show that the master knew of or authorised the particular sale. It is enough to show a general authority to the servant to sell on his master's behalf.

Absence of such knowledge and authority is ground for mitigated penalty, ...

Mischief—*Indian Penal Code.*—*Section 425.*—*Cutting trees for public purpose.*—The accused A., C. and another, members of the Municipal Committee of Jalapur, permitted a tree within Municipal limits to be cut for a public purpose, against the order of the Municipal Committee as a body. *Held* that accused had not committed the offence of mischief as defined in Section 425 of the Indian Penal Code, ...

Month—*Solitary confinement.*—*Held* that for the purpose of executing a sentence of solitary confinement, a month signifies a period equal to the average duration of a calendar month, that is (disregarding fractions), thirty days, ...

N.

Native Indian subjects—*Amenability of.*—*to British Courts in respect to offences committed beyond India.*—*Act XI of 1872.*—*Section 3, Clause 2 and Section 9.*—D. G. and S. G., British subjects, crossed the frontier into independent territory and there murdered one K. M. *Held*

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The references are to the Nos. given to the cases in the "Record."

that D. G. and S. G. could be tried for murder by the British Courts under Sections 9 and 3, Clause 2, Act XI of 1872. Native Indian subjects of Her Majesty are amenable to the British Courts in respect to offences committed by them in all territoriss beyond India, ...

Native State—See "*Foreign Territory*."

O.

Opium Law—breach of—Act X of 1871, Sections 58, 62, and 70—*Liability of master and servant*.—R., brother and servant of S., a licensed vendor of opium, sold to one A., opium in excess of the quantity allowed by law. On the conviction of R. under Section 70 of Act X of 1871, and of S. under Section 58,

Held that R. was not liable under Section 70, but could be convicted under Section 62, as he was not protected in the case of an unlawful sale by the plea of his master's authority.

Held further, (SMYTH, J. doubting), that the conviction of S. under Section 58 was good in law.

Per PLOWDEN, J.—A licensed retail vendor of opium is liable to penalties under Section 58, Act X of 1871, for a sale by his servant of an unlawful quantity of opium. It is unnecessary to show that the master knew of or authorised the particular sale. It is enough to show a general authority to the servant to sell on his master's behalf.

Absence of such knowledge and authority is ground for a mitigated penalty, ...

Opium rules—Breach of—Act IV of 1872, Section 50, Clauses 1 and 2—*Penalty*.—Clause 2 of Section 50, Act IV of 1872, having been repealed by Act XV of 1875, *held* that the penalty provided by that clause no longer attached to a breach of a rule made under the first clause of that section, ...

Opium or Charas—Unlawful possession—Importation without pass from Foreign territory—Excise Act X of 1871, Sections 63 and 65—Licensed retail vendor—Agent of Transferee of—The accused P. was convicted under Section 65 of the Excise Act X of 1871, for having in his possession 10 seers of opium and 16 seers of charas, smuggled from Faridkot territory into Ferozepore, he not being a licensed vendor. P. pleaded that he and his brother M. were acting as agents for the licensed vendors, K and R. C. The Magistrate held that K. and R. C. were farmers under Section 25, Act X of 1871; that it was not proved that P. and M. were subordinate license holders as no information had been given to the Collector under Section 28; that P., smuggled opium and charas from Faridkot territory without a pass, and therefore, that P. was guilty under Section 65. The Sessions Judge (Commissioner) on appeal found that the license held by K. and R. C. was not transferable; that no license had been granted to P., and therefore, that he could not be considered a licensed vendor.

No.

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The references are to the Nos. given to the cases in the "Record."

No.

Held that the question for decision was whether the opium and charas were in the possession of P. on his own account or as agent for the licensed vendor; and that, if in the possession of P. as agent, he was not liable to punishment under Section 65, Act X of 1871.

The license granted to a licensed retail vendor of drugs is not transferable, but such vendor may employ agents and servants in his own business, and if a transfer be made in good faith the offence of the transferee, in being in possession of unauthorized quantities of opium and drugs, is not one calling for severe punishment.

Held further, that a licensed vendor cannot be convicted under Sections 63 and 65, Act X of 1871, for importing charas or opium from foreign territory without a pass, ...

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P.

Peshawar murder cases—True charges against the guilty added to by utterly false ones against the innocent—Element of doubt—Evidence Act I of 1872, Section 3—Fact when held to be proved.—In dealing with Peshawar murder cases there may be an element of doubt of scarcely a tangible character, which is often felt when dealing with the evidence of Pathans of the Peshawar district, owing to their proneness to exaggerate and add to true charges against the guilty, utterly false ones against the innocent; but it is not this kind of doubt which should lead a Court to acquit an accused person.

The degree of certainty which must be arrived at before a fact is said to be proved is that described in Section 3 of the Evidence Act, ...

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Possession—"Dunds" or ponds—Theft of fish from—Indian Penal Code, Sections 378 and 379.—The accused caught fish in the Sundri dund, a sheet of water five miles long by 20 feet broad. The right of fishing in this and other dunds had been leased to a contractor by the Government. *Held* that the fish in the pond were not in the possession of any person within the meaning of Section 278, Indian Penal Code, and could not therefore be the subject of theft, ...

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Powers of Revision. See "*Criminal Procedure Code, Section 297.*"

Powers of Superintendence. See "*Superintendence.*"

Pregnancy of convicted woman—Criminal Procedure Code, (Act X of 1872) Section 306—Capital Sentence—Commutation.—Under Section 306, Act X of 1872, ascertained pregnancy renders it compulsory to postpone the execution of a sentence of death passed upon a woman, and may be a reason for commutation by the High Court; but a capital sentence should be pronounced on a conviction for murder, notwithstanding pregnancy, although the execution of the sentence should be deferred, ...

34

Publication of Tirni rules of Jhang District—want of. See "*Tirni rules, &c.*"

Purchaser—Bonâ fide. See "*Bonâ fide Purchaser.*"

R.

Re-trial—of one of several persons who have been jointly tried and convicted—Power of Appellate Court to order.—See "*Appellate Court.*"

Revision—powers of. See "*Criminal Procedure Code, Section 297.*"

The references are to the Nos. given to the cases in the "Record."

No.

S.

Security for good behaviour—Criminal Procedure Code, Chapter XXXVIII, Sections 504 to 506—Personal recognizance of bad character—Bond of surety—Recovery of amount of personal recognizance from bad character.

Held by Lindsay and Fitzpatrick, JJ., that a Magistrate can legally require a person convicted under Sections 505 and 506 to furnish a personal recognizance in addition to the security for his good behaviour.

Held further, that when there is only one surety he should bind himself only to the same amount as the principal, and when there are several sureties they should bind themselves jointly and severally for the same amount.

Held further, by Lindsay, J., that there is no provision in Chapter XXXVIII of the Code of Criminal Procedure, for the recovery of the sum mentioned in the bond entered into by the bad character himself, his surety being responsible for that sum, ...

Solitary confinement—Indian Penal Code, Sections 73 and 74—Month.—Accused was sentenced to 4 months' rigorous imprisonment, of which one month to be in solitary confinement, and a fine of Rs. 25 or 1½ month's further rigorous imprisonment in default. *Held* that the sentence of one month's solitary confinement was legal, notwithstanding that accused could not lawfully, under Section 74, Indian Penal Code, be subjected to more than 28 days solitary confinement, if the imprisonment continued for only four months.

Held further, that for the purpose of executing a sentence of solitary confinement, a month signifies a period equal to the average duration of a calendar month, that is (disregarding fractions), thirty days, ...

Stolen property—Disposal of—When stolen in British but seized in Foreign territory—Criminal Procedure Code—Section 418.—Held that a Magistrate has jurisdiction under Section 418, Act X of 1872, to deal with property stolen in British territory, notwithstanding that it may be seized in Foreign territory and brought into British territory by the Police, ...

Stolen property—Order for disposal of—Criminal Procedure Code (Act X of 1872), Section 418—Bond fide purchaser.—In a summary proceeding under Section 418 of the Criminal Procedure Code, where stolen property is in the possession of a *bond fide* purchaser, the proper order for a Magistrate to pass is to leave the property in the purchaser's possession, leaving the complainant to take such steps as he may think proper to establish his title as owner and recover possession from the purchaser, ...

Superintendence—powers of Chief Court—Criminal Courts—Act XVII of 1877, Sections 15 and 25—Criminal Procedure Code (Act X of 1872), Sections 297, 518 and 520—Powers of Revision—Non-Judicial proceeding under Section 518.—Under Section 518, Act X of 1872, the Magistrate of the district of Jullundur directed Mussumat Faizulnissa and her mother to remain in the Haveli in which they then were, assuring to them all pre-existing privileges. He further directed that the

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The references are to the Nos. given to the cases in the "Record."

No.

brothers of M. F. should leave the premises and take up their abode elsewhere, pending the result of an appeal from the decree of the Judicial Assistant declaring the right of M. F. to leave her place of residence and marry without the consent of her brothers, and that a strong Police guard, paid for by the brothers, should keep guard over the outer gate of the Haveli, with directions to permit certain persons to come and go, but under no circumstances to allow the brothers or one M. H. K. the right of entrance.

Held that the Magistrate had no jurisdiction to make the order under Section 518, Criminal Procedure Code.

Held further, that Section 297, Criminal Procedure Code did not empower the Chief Court to revise the order made under Section 518, even though the order was manifestly in excess of the authority of the Magistrate professing to act under that Section. When a Magistrate records a proceeding and issues an order under Section 518, intending and professing to act not merely under color of that Section, but in an honest, through mistaken, belief that he has power to act under it, the order made by him is an order made under Section 518 within the meaning of Section 520, and is therefore not a Judicial proceeding. Such an order does not become a Judicial proceeding and order, because although it is in excess of the Magistrate's authority under Section 518 and made without any lawful authority whatever, it is yet a proceeding and order held and made by a Magistrate.

Held further, that the Chief Court had no power, under its powers of general superintendence, under Section 25 of Act XVII of 1877, to revise the order of the Magistrate, as that Section gave the Court no power of general superintendence over Criminal Courts, ...

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T.

Tanawal—Upper.—See "*Upper Tanawal.*"

Theft of fish from "Dunds" or ponds—Indian Penal Code, Sections 378 and 379—possession.—The accused caught fish in the Sundri dund, a sheet of water five miles long by 20 feet broad. The right of fishing in this and other dunds had been leased to a contractor by the Government. *Held* that the fish in the pond were not in the possession of any person within the meaning of Section 278, Indian Penal Code, and could not therefore be the subject of theft, ...

11

Tirni or Rakh rules of Jhang District—Want of publication—Conviction for breach of rules.—Certain Tirni rules for the Rakhs in the Jhang district were framed under Sections 48 and 50 of Act IV of 1872, and sanctioned by the Punjab Government in letter No. 1203, dated 17th August 1872 to address of Secretary to Financial Commissioner, but were not published in the *Punjab Gazette* as required by Section 50. *Held* that, as no publication took place, the rules were wanting in the force of law, and that a conviction under Section 50 for a breach of the said rules was accordingly invalid, ...

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The references are to the Nos. given to the cases in the "Record."

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U.

Upper Tanawal—British India—Act I of 1868, Section 2, Clause 8.—Held that, Upper Tanawal is an integral part of British India within the meaning of Clause 8, Section 2, Act I of 1868, and therefore the Sessions Judge of Peshawar has jurisdiction to try offences committed to him for trial from that part of the Hazara district, ... 6

W.

Whipping—punishment of, when to be inflicted—Criminal Procedure Code, (Act X of 1872), Section 310.—Accused was convicted by the magistrate of the district and sentenced to 7 years' rigorous imprisonment. The Sessions Judge, to whom the case was referred for confirmation, modified the sentence to one of one year's rigorous imprisonment, and "30 stripes, to be administered when leaving jail." Held that the order of the Sessions Judge directing the whipping to be administered at the time of release was illegal.

Under Section 310, Act X of 1872, it is imperative to carry out a sentence of whipping, in addition to imprisonment, immediately on the expiry of 15 days from the date on which it was passed, unless an appeal be made within that time, ... 31

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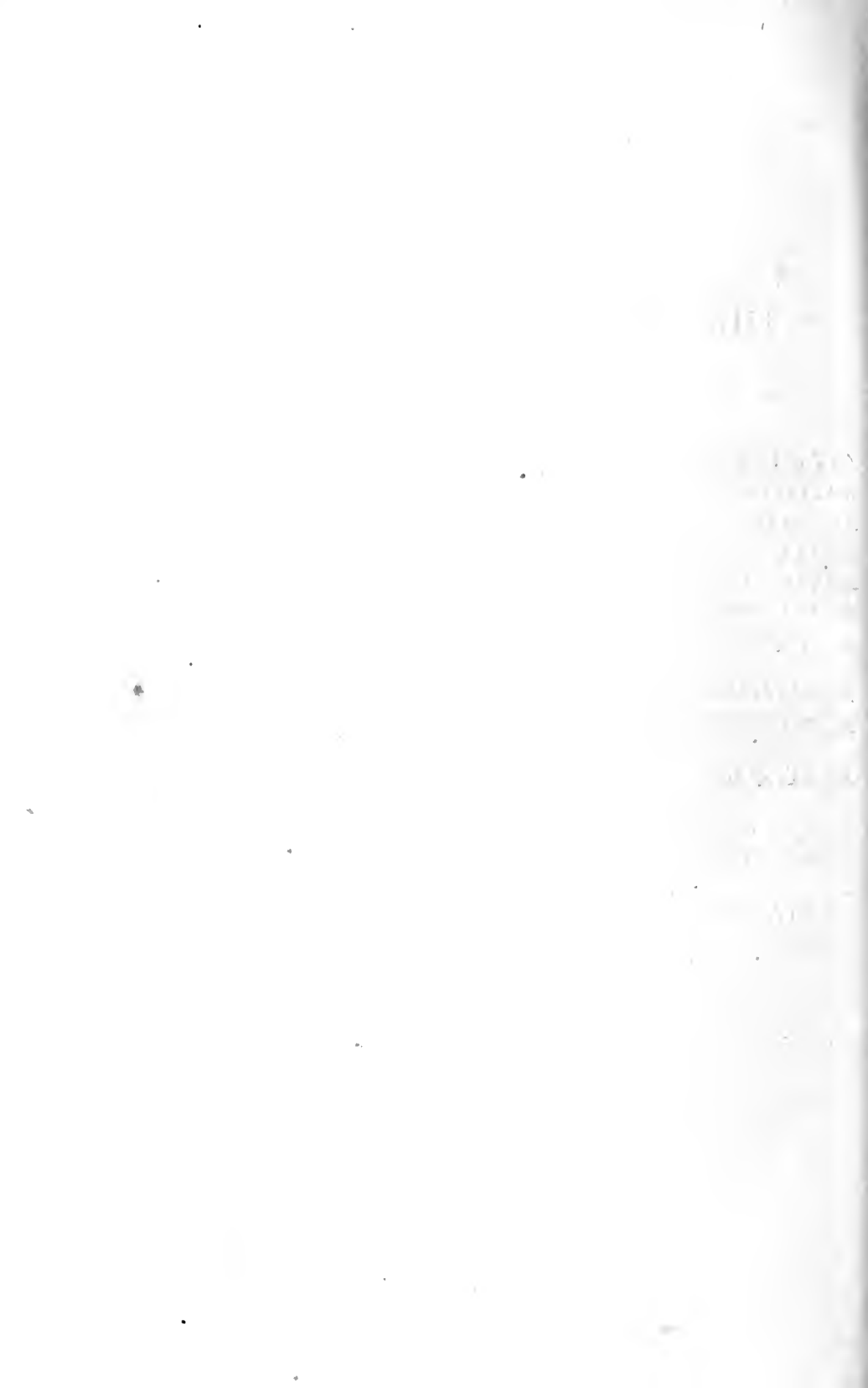
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CIVIL JUDGMENTS, 1878.

Chief Court.
CIVIL JUDGMENTS.

No. 1.

BANSI LAL AND OTHERS,—(Plaintiffs),—APPELLANTS, Versus THE SECRETARY OF STATE FOR INDIA IN COUNCIL,— (Defendant),—RESPONDENT.	}	APPELLATE SIDE.
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Case No. 516 of 1877.

(FITZPATRICK AND SMYTH, JJ.)

Board of Administration Circular 8 of 11th February 1852—Powers of Settlement officers—Grant of zamindari in Khana Khalee or Government estates—Sanction to Settlement—Ratification—Estoppel.—By an order of the Settlement officer of the Ambalah district, dated 24th March 1852, one D. was granted the zamindari of Raiyanwala, and his name was directed to be entered in the proprietary column in the Settlement papers. In pursuance of this order the subordinate Settlement officials recorded D. as proprietor of each field or plot in the village, including two plots now in dispute. The Settlement officer was acting under the authority of Revenue Circular No. 8, dated 11th February 1852, of the Board of Administration, which authorized Settlement officers to grant the zamindari or proprietary rights in *Khana Khalee* or Government estates to private persons.

It did not appear that the Settlement officer had his attention drawn to the fact that, although the entire village of Raiyanwala belonged to Government, there were portions of it which were in the possession of the Canal department, and part of it occupied by the bed of the Western Jumna Canal. All such portions, including even the bed of the canal, were recorded as the property of D. in pursuance of the above order.

It was found that the two plots in dispute formed part of the land then in possession of the Canal department, and that they had been in possession prior to the grant to D. and had continued in possession up to the present date, and had all along used the plots for canal purposes. In 1860 certain letters passed between D.'s representatives and the Commissioner and Deputy Commissioner of Ambalah. The Deputy Commissioner heard that negotiations were going on for the sale of D.'s estate. He pointed out that they would not be allowed to sell the farms of certain villages which had been held by D. and the terms of which had not then expired, as these were not transferable; and that as regards the villages held by D. in proprietary right, they must sell to the resident cultivators, who had the right of pre-emption. The cultivators were unable to purchase, and eventually D.'s representatives sold the village of Raiyanwala to plaintiffs, on which *dakhil kharij* or mutation of names took place.

Held by FITZPATRICK, J., that the grant of the zamindari did not include the two plots in dispute, which were looked upon as part of the canal.

Per SMYTH, J., that the Settlement officer exceeded his authority in granting the zamindari without reserving to Government the plots in dispute, as the Circular of the Board of Administration referred only to lands which were used for agricultural purposes, or which might by reclamation or otherwise be used for such purposes, and did not include lands held by Government for public purposes.

Per Curiam.—That the Government in sanctioning the Settlement of the Umballa district did not ratify all the acts of the Settlement officer, including the grant of the entire village of Raiyanwala; and that plaintiffs had failed to show any acts or admissions on the part of the officers of Government since the date of the grant which would have the effect of estopping Government from contesting plaintiffs' claim.

Regular Appeal from the order of the Extra Assistant Commissioner of Ambalah, dated 30th October 1876, removed from the Court of the Commissioner of Ambalah to the Chief Court under Act IX of 1873.

Ludlam for Appellants.

Rivaz for Respondent.

This suit was brought by the plaintiffs to recover possession of two plots of land in the village of Raiyanwala, numbered respectively 815 and 817 in the settlement khasrah, and measuring 131 bigas 9 biswas, from which they alleged that they were ejected in 1874 by certain officers of Government employed in the Canal Department, and also to recover Rs. 75 as the value of grass and reeds wrongfully cut and removed from the land by the said officers in 1874.

The plaintiffs alleged in their plaint that the village of Raiyanwala was granted by Government in proprietary right to one Mr. Dawe, and was recorded as Dawe's property in the record of the settlement of the Ambalah district; that Dawe having died they purchased the village from his widow in November 1860, and obtained possession of the village under the deed of sale; that in kharif 1871 Mr. James, an officer employed on the Western Jumna Canal, cut grass and reeds from the two plots in dispute, which are part of the village of Raiyanwala, and had come into their possession under the sale; that they brought a suit against James to recover the value of the grass and reeds so removed, but it was dismissed on the ground that the grass and reeds having been used for canal purposes the suit should have been brought against Government; that in 1872 they cut and removed the grass and reeds according to the long established usage; that in 1873 Mr. James again began to cut and remove the produce of the land, but was stopped by their servants; that eventually as the Deputy Commissioner, in certain miscellaneous proceedings in 1874, while recognizing them as proprietors of the land, considered that both they and the Canal Department were in possession, and that the dispute could only be decided in a regular suit, they were obliged to bring the present suit to obtain possession of the land.

The Government Advocate on behalf of defendant pleaded—(1) that the land in dispute lay between the banks of the Western Jumna Canal, and is the property of Government, and had always

been so; (2) that it was occupied by Government prior to the existence of the village of Raiyanwala, which was founded by Mr. Dawe, a canal officer, about 1830 A. D.; (3) that from time immemorial the Canal Department had been in possession of the land in dispute, and taken the produce; (4) that the village of Raiyanwala was one of the "free villages" on the canal, in which villages the Canal Department took what land was required for departmental purposes and gave canal water free in exchange, the village giving free labour; (5) that plaintiffs did not purchase the land from Dawe or his representative.

Plaintiffs rejoined that Government in its own settlement papers of 1852-53 had recorded Dawe as owner of the land in dispute; that plaintiffs purchased the land from the nephew and heir of Dawe, and mutation of names had taken place in their favor in the revenue register, and they had held possession continuously ever since and defendant had admitted their title: that defendant by his admission was estopped from raising any plea of this kind; that as a favor the canal officers were allowed grass, reeds, &c., gratis at a time when canal water was given free; that defendant had no right of easement or other right to or upon the land.

The issues fixed were—(1) whether any statement in the settlement record or in the dhakhil kharij proceedings acts as an estoppel to the claim of Government;

(2.) Whether the land has been for more than 12 years the property of Government;

(3.) Whether Dawe had a right to dispose of the land, and whether he did dispose of it to plaintiffs;

(4.) Whether plaintiffs or defendant have held possession for the last 12 years;

If defendant, whether his possession has been adverse for that period.

The case was tried by the Extra Assistant Commissioner of Ambalah, Mr. Pitcaithly, who found, on the 1st issue, that Government was not estopped by any entry in the settlement record; and on the 4th issue, that defendant had held adverse possession of the land for more than 12 years. On the other two issues he considered it unnecessary to come to any finding. In the result the Extra Assistant Commissioner dismissed the suit with costs.

From this decision the plaintiffs appealed to the Commissioner of Ambalah, on the following grounds:—

(1.) That the defendant's agents having recognized plaintiffs' title as well as that of the persons through whom they claim, in official records, for the proper preparation of which the said agents were expressly appointed, and which records were framed for the purpose *inter alia* of affording a registration of proprietary rights, the defendant cannot now dispute that title.

(2.) That plaintiffs were induced to purchase the land in dispute on the strength of the settlement records, which afforded the only evidence of title by which they could be guided; and the defendant's authorized agents having permitted that sale to

take place, and having officially sanctioned the transfer to them, the defendant is now estopped from setting up an adverse anterior title.

(3.) That the Lower Court was not justified in finding that defendant has exercised any adverse or exclusive possession for 12 years.

(4.) That even if it were proved that the Canal Department occasionally took grass produce, it is evident from the evidence that this was not in virtue of any proprietary right, but simply in lieu of free water—*vide* Mr. James' purwana dated 28th November 1871 to plaintiffs' address, which shows distinctly that up to that date plaintiffs' proprietary rights were not disputed.

(5.) That the plaintiffs' proprietary right is sufficiently established by parol and documentary evidence, which the defendant has failed to rebut.

The appeal was removed into the Chief Court from the Court of the Commissioner of Ambalah.

The circumstances under which the village of Raiyanwala was granted in proprietary right to Mr. Dawe were briefly as follows :— It is a village situate immediately under the Sewalik Hills, and was considered to belong to Government. Mr. Clerk, Political Agent at Ludhiana, in a letter No. 23 dated 10th December 1834, to the Governor General's Agent at Delhi, wrote that the lands of this village had for ages been over-run with jungle, and the reputed insalubrity of the spot, added to the nightly devastations of the crops by wild elephants and the attacks of tigers, led him to fear that they would long have remained so had not Mr. Dawe undertaken the task of clearing them. A lease or farm of the village was given to him by Government for five years on favorable terms, and was subsequently extended to fifteen years. Mr. Dawe brought so much enterprise and perseverance to the task of clearance that even in 1834, only two years after receiving the lease, Mr. Clerk in the letter above quoted was able to write that the lands were being fast reclaimed, and the country fast assuming a highly cultivated appearance where on his first visit to that quarter there were only a very few fields to be seen.

Mr. Dawe's lease for 15 years expired in 1905 Sambat = 1848, A. D. Some claimants then came forward who advanced claims to the proprietary right in the village. These were investigated in the Settlement department, the Ambalah district being then under settlement, and the settlement officer held that no one had established a claim to the proprietary right; but he considered that as Mr. Dawe had at great labour and expense done much towards reclaiming the village, he was the best entitled of any of the claimants to receive a grant of the proprietary right from the Government; and accordingly, by his order of the 24th March 1852, he granted the zamindari to him and directed his name to be entered in the proprietary column in the settlement papers.

In pursuance of this order the subordinate settlement officials recorded Mr. Dawe as proprietor of each field or plot in the village, including the two now in dispute.

It did not appear from the papers relating to this grant that the settlement officer had his attention directed to the fact that, although the entire village of Raiyanwala belonged to the Government there were portions of it which were in the possession of the Canal department, and part of it occupied by the bed of the Western Jumna Canal. All such portions, including even the bed of the canal, were in pursuance of the above order of the settlement officer recorded as the property of Mr. Dawe.

Mr. Rivaz for the defendant contended that the two plots now in dispute formed part of the land then in the possession of the Canal Department; that they had been in such possession long before the grant, and have so remained up to the present date, and were used all along for canal purposes; and, therefore, that the settlement officer exceeded his authority in granting these plots to Dawe.

Smyth, J.—(after stating the facts, continued)—The first question which arises for consideration is whether the land in dispute was at the time of the grant of the zamindari of Raiyanwala to Dawe in the possession of the Canal Department, and used by that department for the purposes of the canal. I have examined the evidence carefully with a view to coming to a finding on that question, and I extract here such parts of the evidence as appear to me to be the most material on this point.

Of the Canal officers produced by the defendant as witnesses the one who was earliest connected with this part of the canal is Captain Willcocks. He joined the canal in September 1844 as an Assistant Overseer, and left it in 1854. For the first five years of this term Mr. Dawe was his immediate superior officer. Captain Willcocks was examined by commission, and one of the questions put to him was—

What was the practice in your time as to taking the produce of the land in suit? He replied—"The canal authorities always took such produce without asking permission of or making payment to any one. No one else ever did. During the ten years I was there no one ever attempted to take this produce or ever put in a claim for it."

At the end of his examination-in-chief Captain Willcocks deposed "that Mr. Dawe never laid any claim to these lands." In reply to an interrogatory from the plaintiffs he stated—"The thatching grass we used to take from the hills and from the islands in the canal."

The next witness is Mr. Duncan, now Executive Engineer of the Head Works Division, Western Jumna Canal. He was first connected with this portion of the canal in 1852 as Overseer, and has been there ever since. He deposed—"I know the plots 815 and 817 (on the map). No. 815 is merely the silt thrown up by the old 3rd head channel, and No. 817 is merely an island in the channel of the canal. The produce of No. 815 was nothing but grass, of No. 817 brushwood and grass; neither plot has been cultivated in my time, and No. 815 certainly has not. If we required the produce of these two pieces we took it, viz., up to date. The grass was used for hutting canal work people,

"and the brushwood was taken for making gabions for constructing the bunds. "I never made any compensation to any one for the materials taken. I never asked permission either. Plaintiff Bansi Lall never objected to me or asked me for compensation during my time, i.e. up to about 1868, and when I was personally in charge and constructing the the works. After that application would be made to Mr. James on the spot. Mr. Dawe was not on the Western Jumna Canal in my time."

In cross-examination by plaintiffs' pleader Mr. Duncan stated—"I know nothing of the cattle grazing on this land by permission of plaintiff. All I know is that we have always got the grass, and any cattle may graze there so long as we got this. We claim no other right." And in answer to a question of the Government Advocate he stated—"Cattle *may* have grazed there during my time."

Mr. James was next examined. He stated that he knows Raiyanwala well, and has been connected with that section of the canal since March 1858 as Overseer, Sub-Engineer, and Officiating Executive Engineer, and is still connected with it. He proceeded to say—"No. 815 is what I should call papoo land formerly the bed of a river, now grass, boulders, and sand. No. 817 is partly grass and partly boulders and sand. There is some brush-wood. 817 is an island Since my arrival the Canal Department have always taken the produce of 817 as far as required. No. 815 the same. The produce was taken for our works. I never asked permission or paid any one for it. Bansi Lall had complained of my taking the produce; cannot say exactly when first, about 5 or 6 years ago. I understood that his servants had interfered, and when I went down the opposition ceased. We have taken the grass every year since, though our people have complained of disputes."

In cross-examination Mr. James was asked respecting the purwana dated 28th November 1871 addressed to Bansi Lall, in which he had referred to Bansi Lall as proprietor of certain land from which brushwood had been removed. He deposed that the purwana did not refer to the land now in dispute at all, and that the *khoba* or brushwood referred to in the purwana came from all over the village of Raiyanwala, and that there was no *khoba* produced on the land in dispute.

The next witness examined was Major Twigge, who was Executive Engineer on this part of the canal from November 1871 till August 1875. In reply to the question who took the produce of these plots he stated—"What I remember is that the grass on these plots was cut during all the time I was in the Division by the Sub-Engineer on behalf of Government, and that Bansi Lall made objection but the Canal Department cut the grass and brushwood. I cannot say whether it was cut every year; but to the best of my knowledge Bansi Lall never cut it."

Several native witnesses were produced by the plaintiffs. I do not think it necessary to make extracts from their evidence. The Lower Court had the advantage of hearing them

give their evidence and much weight is therefore due to its estimate of their credibility.

It writes—"The Court next proceeds to examine the parol and other evidence as to actual possession of the land by user. Two assertions are made under this head—1st, that before settlement the land in dispute was cultivated; 2nd, that the natural produce of the land was used." The evidence to prove cultivation the Court dismissed as a good deal more than doubtful, and I think rightly so. At settlement the plots in dispute were recorded as uncultivated. No. 815 was entered as sand (*ret balu*), and No. 817 as jungle.

"As to the jungle produce" (the Court writes) "the witnesses of plaintiffs who give evidence relating to a time before plaintiffs' purchase, state that Mr. Dawe cut the jungle grass &c., which is evidence more in favor of defendant than plaintiffs, for Mr. Dawe was a canal officer, and it is not shown that he used the produce for his private purposes except in the evidence of Koorah, which will be critically examined hereafter; and it may therefore be assumed from the evidence, and made certain from the evidence of Captain Willcocks and Mr. Duncan, that the grass &c., collected by Mr. Dawe was for canal departmental purposes."

But Mr. Ludlam urged that in what are called "free villages" the Canal Department was allowed to take grass and jungle produce in consideration of its supplying canal water free; and that therefore, even assuming that the Canal Department took the produce of these lands, that does not imply that it took it in virtue of any proprietary right or any right of easement. The evidence however of defendant's witnesses shows that what was meant by "free villages," was that *free labour* was supplied by the villagers in consideration of free water being supplied by the Canal department. Moreover, Raiyanwala ceased to be a free village prior to the date of plaintiffs' purchase, and yet the Canal Department did not cease to take the jungle produce.

The Extra Assistant Commissioner thus sums up the evidence on the 4th issue. "On the whole evidence on this 4th issue therefore it appears to the Court that the Government (Canal Department) has taken the jungle produce and the grass from the two plots in dispute, certainly since 1844 A. D., and that in 1871 plaintiffs first attempted to seize the grass &c., since which this suit has been hatching. That the Government possession was adverse may be inferred from the fact that the first resistance met with in 1871 was at once resented by the local officers, as the purwanas filed show. It is also shown in evidence that the defendant used the grass &c., during the lifetime of Mr. Dawe, and that he never asserted any right to the land or the produce thereof, and he had ample opportunity for doing so as Captain Willcocks in his evidence shows that during the 10 years from 1844 to 1854 Mr. Dawe was during five of those years his (Captain Willcock's) immediate superior officer on the canal."

In coming to a finding on the question of possession and user it is important I think to bear in mind the situation and

physical features of the plots in dispute, and also the nature of the produce and the requirements of the Canal Department.

The canal at this part of its course is nothing more than one or more of the branches of the river Jumna. The outline of the channel is irregular, and it would be difficult to demarcate precisely the limits of the ground occupied by the canal. The plots in dispute are either silt thrown up in the bed of the channel or an island formed by the river (*i. e.*, the canal) opening out here into two branches, which after flowing apart for a short distance again unite and thus enclose the plot numbered 817. In the rainy season or when the river is in flood the plots are almost entirely covered with water, and they may then literally be said to form a part of the bed of the canal. At low water the land is either a sandy tract without vegetation, or producing only grass or reeds or brushwood. Produce of this kind has all along been required by the Canal Department for making the gabions which are used in the construction of dams; and seeing that the land was the property of Government, the produce would naturally be taken by the Canal Department for the purpose indicated.

Under the circumstances above stated I consider the antecedent probability is that the plots in dispute would from a very early period be regarded by the Canal Department as in its possession, and be dealt with by it as the property of Government. Moreover, the evidence of the canal officers, some of whom have been connected with this part of the canal since 1844, long before the date of the grant of the zamindari to Dawe, clearly shows that at and before and since the date of the grant the canal officers took from these plots, as of right, such grass and brushwood as they required for canal purposes. It does not appear that Dawe ever took actual possession of these plots, either under his lease or under the grant to him of the zamindari, or that he ever took any part of the produce other than as a canal officer. Captain Willcocks, who had every opportunity of knowing, expressly states that Dawe never laid claim to these plots. The conclusion then to which I come on this part of the case is that at the time of the grant of the zamindari to Mr. Dawe in 1852, the Canal Department was in possession of the two plots in dispute, and used them for the purposes of the canal.

That being so, the next question which arises is whether the Settlement officer had authority to grant them in proprietary right to Dawe.

Mr. Ludlam contends that he had authority under the Board of Administration's Revenue Circular No. 8 of 11th February 1852. That Circular authorized Settlement Officers to grant the zamindari or proprietary rights in *khana khalee* or Government estates to private persons, and a wide discretion was entrusted to such officers in this matter. But it is clear that the Circular did not refer to all lands which were the property of Government, but only to those which were used for agricultural purposes, or which might by reclamation or otherwise be used for such purposes. Clearly it did not include lands held by Government for public purposes, as will appear from the 3rd para of the

notification, which accompanied the Circular, and in which it is recited that "it is not the policy of the Government to retain in "its own hands the proprietorship of land."

In issuing the Circular, Government could therefore not have had in contemplation land which was in its possession for public purposes, for Government has occasion not only to retain the proprietorship of such lands in its own hands, but frequently to purchase lands for public purposes and often at great expense. The whole tenor of the notification sufficiently indicates the kind of lands which Settlement officers were authorized to grant in proprietary right, and in my opinion it did not authorize the Settlement officers of the Ambalah district to grant the plots now in dispute to Mr. Dawe. Let us suppose that there had been an encamping ground or other plot of land used by Government for a specific public purpose in Raiyanwala at the time the Settlement officer granted the zamindari of the village to Dawe, and that the Settlement officer in making the grant did not reserve it from the grant, could it be contended that the effect of the grant would be to give to Dawe a valid title to the proprietary right in such plot, and that Dawe could therefore sue to obtain possession of it? Surely not. And yet if I am right in my finding that the plots now in dispute were in the possession and use of the Canal Department at the date of the grant to Dawe, they stood exactly on the same footing as an encamping ground or other Government plot would have stood.

I consider then that the Settlement officer exceeded his authority when he granted the plots in dispute to Dawe.

The question remains as to how far Government is bound by this act of the Settlement officer. The general rule as to the liability of Government for the acts of its servants was laid down by the Privy Council in the case of the *Collector of Masulipatam v. Cavalry Vencate Narainapah*, (8 Moore's I. A. 554) where their Lordships declared that "the acts of a Government officer bind the Government only when he is acting in the discharge of a certain duty within the limits of his authority, or if he exceed that authority when the Government in fact or in law directly or by implication ratifies the excess." Mr. Ludlam contends that Government did ratify the grant of the plots in dispute to Dawe. I understood him to say that Government in sanctioning the Ambalah settlement must be held to have ratified all the acts of the Settlement officer, including the grant of the entire village of Raiyanwala to Dawe. But there is nothing to show that this grant was ever brought to the knowledge of Government, much less that Government knew that the grant included certain lands which were in the possession of the Canal Department and used by that department for the purposes of the canal.

It can hardly be contended I think that a formal sanction given by Government to a work of such magnitude as a settlement of the land revenue of a district, which embraces operations of great detail and complexity, can be interpreted to mean that the Government has ratified all the acts of the Settlement officer, although in point of fact the acts may never have been brought to the knowledge of the Government.

But Mr. Ludlam further contended that the Government was estopped by the acts of its agents from contesting the validity of plaintiffs' title to the plots in dispute. These acts are described in the 1st and 2nd grounds of appeal. In addition to these, Mr. Ludlam referred in his argument to certain letters which after Mr. Dawe's death had passed between Dawe's representatives and the Commissioner and Deputy Commissioner of Ambalah, relative to the sale of Dawe's estate, including the village of Raiyanwala. The purport of that correspondence was simply this: The Deputy Commissioner heard that negotiations were going on for the sale of Dawe's estate to a banker of Saharunpur. He pointed out that Dawe's representatives would not be allowed to sell the farms of certain villages which had been held by Dawe, and the terms of which had not then expired, as these were not transferable; and that as regards the villages held by Dawe in proprietary right, while his representatives were entitled to dispose of them by sale, they must still according to the local law of the Punjab sell them to the resident cultivators, as these had the right of pre-emption. It turned out that the cultivators were unable to provide the purchase money, and Dawe's representatives were allowed to sell the villages to strangers. Accordingly the plaintiffs purchased the village of Raiyanwala.

In that correspondence the question of Dawe's right to the plots in dispute was never once alluded to, nor was the question raised as to the extent of Dawe's rights in that village. What the local authorities said simply amounted to this: "Dawe is recorded as owner of Raiyanwala: we hear his representatives are going to sell the village to a banker: we write to inform them that they must first offer it to the resident cultivators." There was nothing in this correspondence which could estop the Government from disputing Dawe's right to particular plots in the village.

As to the effect of the settlement entries and *dakhil kharij* proceedings in estopping the Government from disputing the plaintiffs' title to the plots in dispute, I cannot do better than quote at some length the remarks (in which I concur) made by the Allahabad High Court on a similar question which came before it in the case of the *Collector of Moradabad v Mussummat Doorga*, which will be found reported at page 25 of the Report of the Legal Remembrancer N. W. P. for the year 1868-69. In that case the claim of the Government was resisted on several grounds, by one of which it was contended that the Government was estopped from preferring the claim by the acts and admissions of its servants, in that they had from time to time recognised the defendant, and those under whom she claimed, as proprietors, making settlements with them, and recording their names in the proprietary column in the revenue records, and dealing with them (as persons entitled to sell) for the purchase of a piece of land which formed a portion of the estate then in suit. With regard to this plea the High Court, after referring to the passage which I have above quoted from 8 M. I. A. page 554, went on to say.—"Undoubtedly Settlement officers are entrusted with very large powers. They have to determine what revenue properly

“represents the interest which the Government claims in the soil
“of every acre in these provinces ; they have to take engage-
“ments for the payment of that revenue from persons whom they
“may find in possession as zamindars, or in the absence of zamindars, or of zemindars willing to engage, they may take engagements from other persons whom they may select as best entitled to engage ; and in settling estates in which the Government have heretofore recognised no proprietor, and which are consequently termed *khana khalee* (the proprietary column in the register having been left blank) they may, on behalf of Government, recognise the persons having the best title to be zamindars as old inhabitants, or village managers, and confer on them the zamindari, and they must in the exercise of the duties above mentioned, frame a record of the rights of those whom they consider to be in possession of rights. To enable them to do this, they have been entrusted not only with executive but with judicial powers of a summary nature.

“These judicial powers are exercised when there is a contest between rival claimants before them. Unless the Settlement officer be acting judicially and dealing with questions of contested right he cannot, by his recognition or record confer on the person whom he records as in possession of the soil a title which will be good against all claimants. To explain what we intend to convey more clearly, he cannot by recognising a Hindu widow as in possession, and making a settlement with her, confer on her a title against a reversioner as to the property in respect of which settlement has been made with her ; he cannot confer on a trespasser whom he may erroneously admit to settlement a title to the rights in the soil, of which he considered him possessed, which would prevail against the rightful owners who may come forward to contest it in proper time ; and if the acts of the Settlement officer be only so far operative in the cases of private persons, is there any good reason to hold that they have more force against the Government ? Undoubtedly in making settlements, the ordinary right which Government possesses in the soil is limited, and we may say demised for a certain rent, but no Settlement officer would be entitled to waive any extraordinary right of Government, as for instance, a right not to a portion only of the profits of the soil but to the whole of the soil itself. The Settlement officer, without special authority, would not cede a reversionary or escheat right held by the Government.”

“There is no evidence of any such authority. The *khana khalee* grant in 1851 affords, indeed, a very strong argument to the defendant in support of her plea of estoppel, so far as concerns the property comprised in it, for by that grant the zamindari was conferred on the persons named in the grant, under the express direction of the Lieutenant Governor ; still even after such a grant, we consider it was competent to any one who claimed title to the lands held by the parties, and in respect of which the grant was made, to have come forward and claimed the lands, and if his title had been proved to have obtained them.

“It is moreover, we think, to be fairly concluded from the circumstances, that the Government was not aware of its rights, nor of the facts which gave rise to those rights, until 1862 or 1863, and without such knowledge it could hardly be contended that the acts of its officers amounted to estoppel.

“As to the mutations of names in the registers, they have never been regarded in this country as conferring title, though they may be used as evidence of title.

“By Regulation XLVIII of 1793, section 30, it was expressly enacted that the entries should not in any way affect the right of parties, who may establish a right of property in the Diwani Adawlut. The purchase made by the Collector we hold of very little importance. It could at the outside amount only to an admission, and an admission made in ignorance of the facts, and by an officer who had no authority by admissions to destroy the rights of the Crown.

“In support of the view we have taken of the first part of this plea, we refer to the case of the *Government of Bengal v. Girdhari Lall Roy* (4 W. R. 13), which has recently been decided by the Privy Council, 17th July 1868. In that case the Government, although they were aware that they possessed a doubtful claim by escheat, by a special purwana allowed the person who claimed to be heir to be recorded as in possession, and gave him a certificate acknowledging him as the *bona fide* proprietor of the estate of the deceased, and subsequently received rent. The Courts in this country held that the Government was not estopped from preferring its claim to the escheat, and disputing the title of the heir; and this finding their Lordships of the Privy Council appear to have considered sound.”

To sum up, the conclusions I come to in this case are these:—

1. The plots in dispute were in 1852 and previously the property of Government, and in the possession of the Canal department, and used by that department for the purposes of the Western Jumna Canal.
2. The Settlement officer exceeded his authority in granting the zamindari of the village of Raiyanwala to Mr. Dawe in 1852 without reserving to Government the plots in dispute.
3. The extent to which the Settlement officer exceeded his authority, or in other words the grant to Dawe of these plots, has never been ratified in fact or in law actually or by implication by the Government.
4. The plaintiffs have failed to show any acts or admissions on the part of the officers of Government since the date of the grant which would have the effect of estopping the Government from contesting the plaintiffs' claim.

It follows that Dawe, and consequently plaintiffs never acquired a valid title to the proprietary right in these plots. The proprietary right still remained with the Government, and the plots have all along remained and still are in the possession of the Canal Department.

I consider that plaintiffs' suit was rightly dismissed, and I would dismiss this appeal with costs.

FITZPATRICK, J.—I too think the appeal should be dismissed. 7th Augt. 1877.

As regards the question whether there was a valid grant of the land in dispute to Mr. Dawe by the Settlement officer's order of the 24th March 1852, I deem it unnecessary to consider whether the settlement officer had authority to make such a grant, because I think that his order when properly construed does not include that land in the grant. It simply gives the "zamindari" of the village.

Now I think when the Government owns the zamindari interest in a village and grants that interest to a private person, nothing is intended to pass by the grant except what the Government holds as *zamindar*. If it so happens that there is a Government school or a police station situated within the village boundaries, it could not I think for a moment be contended that the ownership of such school or police station, or of the site thereof, passes by the grant, and so it would be with the bed of the canal in the present case. I think it is clear beyond any possibility of doubt that the ownership of the bed of the canal did not pass to Mr. Dawe by the grant of 1852.

The land in dispute however is not strictly speaking part of the bed of the canal. It is *conceivable* that the grant might have been intended to include it as part of the ordinary village lands to which Mr. Dawe as zamindar would be entitled, and it accordingly becomes necessary in order to arrive at a proper construction of the grant to look into all the circumstance of the case; but I think, taking all these circumstances into consideration, bearing in mind that the land consists of islands in the canal, at some seasons covered with water, and seeing that down to the time of the grant the Canal officers had appropriated for the purposes of the canal the only produce it was capable of yielding, and that Mr. Dawe, who would as farmer of the village have been entitled to that produce if the land were part of the ordinary zamindari land, never made any claim to it: I think, looking to all this, the most reasonable view of the matter to take is that this land was looked upon as part and parcel of the canal, and that the grant of the "zamindari" was not intended to include it.

What followed affords a strong confirmation of this view. Mr. Dawe after he obtained the grant appears never to have laid any claim to this land. The produce of it continued to be taken by the Canal officers for the purposes of the canal as before, and this without any opposition from any quarter until I may almost say the other day. On these grounds I think that the land in dispute was not included in the grant to Mr. Dawe.

If I am right in this, the entry of this land in the village papers as belonging to Mr. Dawe was, like the similar entry made regarding the land forming the bed of the canal, simply the result of an oversight on the part of the subordinate revenue officials who prepared those papers; and it is impossible to contend that

the passing of these papers among a mass of other similar papers in a formal way by the higher officials could in any way be held to estop the Government from asserting its rights.

The other points of the case have been so fully discussed by Mr. Justice Smyth that I deem it sufficient to add that I concur generally in what he has said regarding them.

No. 2.

APPELLATE SIDE.

DOCTOR J. C. MORICE,—(Defendant),—APPELLANT,—

Versus

THE SIMLA BANK CORPORATION LIMITED, SIMLA,—
(Plaintiff),—RESPONDENT.

Case No. 280 of 1877.

(FITZPATRICK AND SMYTH, JJ.)

Act XVIII of 1869, Schedule II, No. 5—Stamp—Acknowledgment—Act IX of 1871, Section 20—Unqualified admission of subsisting liability—Liability of creditor to take legal proceedings against principal debtor—Discharge of sureties—Act IX of 1872, Sections 134, 137 and 139, English Bankruptcy Act 1869 (32 & 33 Vict. Chapter 71).—Plaintiff sued on a bond, the cause of action on which accrued on 15th September 1868, and relied on a series of letters from defendant extending from 14th June 1870 to 23rd June 1872 as acknowledgments. The claim as against the principal debtor was barred.

The letters generally complained of the way in which Dr. Menzies, the principal debtor, and his son—who was one of the sureties, were evading their obligations, and urging on the Bank (plaintiff) the necessity of taking vigorous measures against them, so as to protect the writer, Dr. Morice (defendant), and the third surety, Captain Price, from the loss which otherwise they would suffer. Dr. Morice wrote throughout as a surety still liable for the debt.

In one letter dated 16th June 1871 Dr. Morice wrote as follows:—

“As Dr. Menzies has behaved in a most dishonest and disgraceful manner, I think he ought to suffer and not the securities,.....
“I trust the Bank will in fairness to the securities take all steps in their power to make Dr. Menzies pay his own debts.....
“I will agree to anything it proposes.”

The letters of 21st and 23rd June 1872, contained the following:—

“I have just heard from Captain Price, and I think we can make arrangements regarding Dr. Menzies' debt to the Bank provided the Bank is not too hard on us. I shall be glad to bear what the Bank propose.”.....
.....“It is quite impossible for us to pay the whole of Dr. Menzies' debt including interest down, but we might come to some arrangement that would be fair to the Bank without being utterly ruinous to ourselves.”

On or about 8th June 1870, Dr. Menzies fled from India, without giving any intimation to the Bank. After some correspondence with the sureties, and after writing to England to Dr. Menzies threatening proceedings, the Bank by a letter dated 22nd November 1870, put the matter in the hands of their London Solicitor Mr. Lattey.

It turned out that Dr. Menzies had gone to live in Guernsey, and the Attorney General of that island, who was consulted, gave an opinion to the effect that proceedings could not be taken in the Courts there until Dr. Menzies had resided there a year and a day. Before the time for proceedings arrived Dr. Menzies fled to some place on the Continent, and when

next the Bank got a distinct clue to his whereabouts he was at Buenos Ayres in South America.

Then followed correspondence in which the possibility of following him there was discussed, but the difficulties were great. On 23rd August 1872 Mr. Lattey advised the Bank to abandon the idea of instituting proceedings in Buenos Ayres. He wrote—"I am free to confess that such steps if taken would in my opinion be accompanied with considerable risk as to costs and more than a strong chance of a futile result." On this advice the Bank acted.

On the 8th June 1871 Dr. Menzies was declared a bankrupt in England, and the Bank accepted a dividend under his bankruptcy in England.

On 27th April 1872, and again on 23rd June 1872, Dr. Morice by letter urged the Bank to institute proceedings against Dr. Menzies, and said he and his co-surety Captain Price were willing to pay expenses.

To the second letter the Secretary to the Bank replied on 28th June 1872—"I note that you are willing to pay the expenses of prosecuting Dr. Menzies at Buenos Ayres. I am now taking steps to have this done, but it must necessarily be a good many months before the result can be known."

Held, 1st, that the letters did not require a stamp under Article 5, Schedule II Act XVIII of 1869. The words "note or memorandum whereby a debt is acknowledged to be due," (Article 5) mean a document made for the purpose of recording and affording evidence of an acknowledgment of a debt, and do not include every letter or other writing which though written without any idea whatever of securing evidence of an acknowledgment happens incidentally to contain an acknowledgment express or implied.

Held, 2ndly, that the letters contained an "unqualified admission of Dr. Morice's liability as still subsisting" within the meaning of Section 20 Act IX of 1871.

That the letter of 16th June 1871, being written within three years from the date on which the cause of action originally accrued, gave plaintiff a new period of limitation extending to 16th June 1874.

That the letters of 21st and 33rd June 1872 as acknowledgments extended the period over three years more, i. e. to the latter half of June 1875, and that the suit having been instituted on 8th June 1875 was within time.

Held, 3rdly, that the Bank was not bound to take legal proceedings against Dr. Menzies, but that such a duty was cast on the Bank by its correspondence with Dr. Morice, and that it had done all that a prudent man would do under the circumstances, and properly discharged the duty it had taken upon itself by its Secy's letter of 28th June 1872; and further, that even if the Bank by the letter of 28th June 1872 had undertaken absolutely and at all risks to proceed against Dr. Menzies, still its neglect to do so would not release Dr. Morice, unless it could be shown that Dr. Menzies was then solvent and had since become insolvent.

Held, 4thly, that the sureties were not discharged by reason of the Bank allowing the claim against Dr. Menzies to become barred by lapse of time, as the law of limitation did not discharge the principal or extinguish the debt, but merely barred the remedy.

Held, 5thly, that the Bank did not by accepting a dividend under Dr. Menzies' bankruptcy in England and assenting to his discharge by their own act release Dr. Menzies so as to discharge his sureties; that Dr. Menzies' discharge under his bankruptcy took effect in India without reference to anything the Bank might have said or did; that Dr. Menzies was discharged in India just as he was in England, not by the act of the Bank but by operation of law, and that, accordingly, his discharge did not carry with it a release of his surety, Dr. Morice.

Regular appeal from the order of the Judicial Assistant, Simla, dated 25th August 1876, transferred from the Court of the Commissioner of Ambalah to the Chief Court, under Section 8, Act IX of 1873.

Spitta for Appellant,
Rattigan for Respondent,

The facts are sufficiently stated in the judgment of the Chief Court, which was delivered by

14th Augt. 1877.

FITZPATRICK, J.—The first question for consideration in this case is, whether the suit is within time. It is admitted on all hands that the law applicable is Act IX of 1871; that the cause of action first accrued on the 15th September 1868; that the period of limitation was three years; and that, accordingly, unless the time has been extended by acknowledgments sufficient under Section 20 of the Act, the plaintiff is barred.

It is, however, contended for the plaintiff that there have been such acknowledgments, and we have been referred to a long series of letters from Doctor Morice to the Bank, extending from the 14th June 1870 to the 23rd June 1872.

Mr. Spitta, who appears for Doctor Morice, argues—

1st.—That these letters do not contain acknowledgments of the nature required by Section 20 of the Act; and

2nd.—That if they did, they would be inadmissible for want of stamp.

As regards the first of these two points, I am clearly of opinion that these letters, if admissible, are sufficient to save the suit from being barred.

They may be described generally as a series of letters complaining of the way in which Doctor Menzies, the principal debtor, and his son, who is one of the sureties, are evading their obligations, and urging on the Bank the necessity of taking vigorous measures against them, so as to protect the writer, Doctor Morice, and the third surety, Captain Price, from the loss which otherwise they will suffer.

Doctor Morice writes throughout as a surety still liable for the debt, and, indeed, such letters would be utterly unmeaning except on the assumption that he was so liable. There is scarcely a letter in the whole series that does not, in my opinion, contain, to use the words of the Act, an “unqualified admission of Doctor Morice’s liability as still subsisting”; and as they form a continuous series extending from the 14th June 1870, a point of time within three years from the date (15th September 1868) on which the cause of action first accrued, to a point of time (23rd June 1872) within the three years preceding the date (8th June 1875) on which the suit was instituted, they are clearly sufficient for the plaintiff’s purpose.

It seems unnecessary to spend time in referring to all these letters at length, especially as most of them are set out in Colonel McMahon’s judgment of 8th July 1875. It will be enough, for the purpose of the point now before us, to refer to three of them, one dated 16th June 1871 and the other two dated respectively the 21st and 23rd June 1872. The first of these letters contains the following passage:—“As Doctor Menzies has behaved in a

“most dishonest and disgraceful manner, I think he ought to suffer
 “and not his securities.....I trust the Bank will, in fairness
 “to the securities, take all steps in their power to make Doctor
 “Menzies pay his own debts.....I will agree to anything it
 “proposes.”

This letter was written within three years from the date on which the cause of action originally accrued, and, on the view I take of it, it gave the plaintiff a new period of limitation extending to three years from its date, that is to say, to the 16th June 1874. Before that new period of limitation had expired, the two letters of the 21st and 23rd of June 1872 were written. They seem to have been written at a time when the Bank had begun to press Doctor Morice and Captain Price for payment, and from them I take the following :—

“I have just heard from Captain Price, and I think we can
 “make an arrangement regarding Doctor Menzies’ debt to the
 “Bank, provided the Bank is not too hard on us. I shall be glad
 “to hear what the Bank proposes.....It is quite impos-
 “sible for us to pay the whole of Doctor Menzies’ debt, including
 “interest, down, but we might come to some arrangement that
 “would be fair to the Bank without being utterly ruinous to our-
 “selves.”

No one, I presume, would doubt that these are acknowledgments within the meaning of the Act, and as they extend the period over three years more or into the latter half of June 1875, they would bring the suit, which, as I have already said, was instituted on the 8th June 1875, within time.

But it is urged that these letters are inadmissible inasmuch as each of them ought to have been stamped under Article 5 of the 2nd Schedule to Act XVIII of 1869. Now this objection was not taken in the Court below, and it has been held by the High Court at Calcutta and by this Court (*III B. L. R. A. C.*, 126, 235; *V. B. L. R. App. 10, Punjab Record*, Nos. 21 of 1866 and 79 of 1870) that an objection of this sort cannot be taken for the first time in appeal; but, assuming that it can be taken, I do not think there is anything in it.

I do not think these letters are chargeable with stamp duty under the Article referred to. That Article runs as follows :—

“Note or memorandum written in any book or written on a
 “separate paper whereby any account, debt or demand therein
 “specified.....is acknowledged to be due.”

Now, it might perhaps be argued that, as the debt is not specified in the letters before us, those letters do not fall within the terms of this Article; but I rest my opinion on a broader ground. It seems to me in the highest degree improbable that the Legislature would render every acknowledgment of a debt occurring casually or incidentally in a letter or other writing subject to stamp duty and make a person neglecting to affix a stamp on such letter or writing subject to a criminal prosecution. To do so would be to introduce a most serious obstruction to ordinary every day business. Suppose, *e. g.*, I write to my boot maker :—“The

"bill you have just sent me is wrong. I have only had two pairs of boots at 25 shillings a pair and you charge me for three". Here is an acknowledgment of a debt, but is it likely that the Legislature would require me to put a stamp on it, and subject me to a criminal prosecution if I neglected to do so? Of course, if the words of the Act admitted of only one construction, an argument of this sort would be of no weight; but it seems to me that the words of this Article fairly admit of being construed so as to avoid this somewhat absurd consequence. I think the words "note or memorandum whereby a debt is acknowledged to be due," taken in their most natural sense, mean a document made for the purpose of recording and affording evidence of an acknowledgment of a debt, and do not include every letter or other writing which, though written without any idea whatever of securing evidence of an acknowledgment, happens incidentally to contain an acknowledgment, express or implied. The whole context of the Article in which these words occur bears me out in this construction, and I have no hesitation whatever in holding it to be the correct one. The letters before us are therefore, in my opinion, admissible without stamp, and being so admissible, they, as I have already said, bring this suit within time.

Coming now to the merits of the case: Mr. Spitta contends that Doctor Morice is released from his obligations as surety for Doctor Menzies:

1st. Because the Bank have neglected to enforce their claim against the principal debtor, as they were bound in duty to the sureties to do;

2nd. Because, in particular, they have allowed their right of action against the principal in this country to become barred by lapse of time; and

3rd. Because they have voluntarily and, by their own act, released the principal by assenting to his discharge under the Bankruptcy Act in England.

Beginning with the first of these points, I should observe that it seems to me unnecessary to decide whether the Contract Act of 1872 applies, for the law will be the same whether it does or not. The 139th Section of the Act, on which the appellant relies, runs thus:—"If the creditor does any act which is inconsistent with the rights of the surety or omits to do any act which his duty to the surety requires him to do and the eventual remedy of the surety himself is thereby impaired, the surety is discharged." This is nothing more or less than a compendious statement of the rule which we should have held to apply if the Act had never been passed. In fact, it seems to be borrowed with but little alteration from a passage in Story's Equity Jurisprudence, cited in the judgment in *Watt v. Spittleworth*, 29 L. J., N. S. Ex. 29. Of the correctness of this rule there can be no doubt. The only questions that arise are questions as to its interpretation and as to its application to the facts of each particular case, and I do not think that these questions present much difficulty in the present case. In the first place, it appears to be well established that, as a general rule, there is no duty incumbent on the creditor

to show diligence in enforcing his remedy by action against the principal debtor. This is manifestly so under the Contract Act (see Section 137) and that it would be the rule here apart from that Act, is so very clear that it is unnecessary to cite authority for it.

Under particular circumstances such a duty may perhaps be made out to exist. To that point I shall return presently, but just now it is enough to say that, as a general rule, the creditor is not bound to diligence in enforcing his remedy by action against the principal, and that mere forbearance on his part towards the principal will not release the surety, but even if this were not so, if the creditor were bound to show diligence in this particular, I should say that the Bank (the plaintiff in the present case) had done all that was required of them. The first default, as I have already stated, occurred on the 15th September 1868; but it is not contended that the Bank ought to have sued Doctor Menzies then.

The nature of transactions like that out of which the present litigation has arisen is well understood in this country, for such transactions are but too common. A Civil or Military officer of the Government having no resource beyond his pay requires a loan from a Bank. He gets two or three other officers to join him as sureties, and on the personal security thus furnished and a policy of insurance, he obtains a loan repayable in instalments. If, as often happens, he is unable to pay the instalments as they fall due, the Bank would not, as long as he retains his position in the Government service, press him hard for payment. They would know very well that, if they did, they could get but little out of him and in getting that little they might ruin him for life. In the present case, accordingly, there seems to have been no serious intention of instituting proceedings against Doctor Menzies as long as he remained in this country and continued to hold his post of Deputy Inspector General of Hospitals. Doctor Morice certainly had no wish to see such proceedings instituted, for we find him, on the 3rd March 1869, and again on the 15th March 1870, asking that Doctor Menzies should be allowed time. But it so happened that Doctor Menzies had another creditor who was not so prudent or forbearing as the Bank. This other creditor pressed him for payment, and the result was that he was obliged, in order to save his appointment, to take leave and fly to England. Doctor Menzies was bound by his bond to the Bank not to leave India except upon certain conditions which would have involved giving previous notice to the Bank, but the first intimation he gave the Bank of his intention of going was by a letter dated 5th June 1870 written from Bombay harbour apparently at the moment of sailing. His departure, under such circumstances, was of course an unlooked for disaster, and the Bank seem to have done all they could to set matters right for themselves and the sureties.

After some correspondence with the sureties, and after writing to England to Doctor Menzies threatening proceedings (see their letter of 7th July 1870) they, by a letter dated 22nd November 1870, put the matter in the hands of their London Solicitor, Mr.

Lattey. It turned out that Doctor Menzies had gone to live in Guernsey, and the Attorney General of that island, who was consulted in the matter, gave an opinion to the effect that proceedings could not be taken in the Courts there until Doctor Menzies had resided there a year and a day, and as Doctor Menzies had then nearly completed that term of residence it was determined to wait. Before, however, the time for proceeding arrived, Doctor Menzies had fled to some place on the continent, leaving his family behind him; and when the Bank next got a distinct clue to his whereabouts, he was at Buenos Ayres. Then followed a correspondence in which the possibility of following him to Buenos Ayres is discussed, but the difficulties were very great. Buenos Ayres seems to be almost an unknown land to a London Solicitor. Mr. Lattey had to consult a private acquaintance, a Mr. William Grain, a man of some experience with South America, as to how he should proceed, and this Mr. Grain informed him that "the trusting one's affairs to any but a Bank out there is attended with some risk, and furthermore that the Banks are very averse to take up any business in which there is a chance of litigation." The River Plate Bank, however, was suggested, and the British Consul at Buenos Ayres was also mentioned as a gentleman who occasionally undertook business for British subjects, but who was described as being "in common with the other gentlemen in the neighbourhood, very dilatory" (Mr. Lattey's letter of 24th May 1872). In a subsequent letter, dated 5th July 1872, Mr. Lattey speaks of employing a gentleman described as a man of the strictest probity and high standing, holding at or near Buenos Ayres the position of Secretary of a Railway Company. But in his last letter on this subject, dated 23rd August 1872, Mr. Lattey advises the Bank to abandon the idea of instituting proceedings in Buenos Ayres. He says, speaking of the proposed appointment of an agent in South America:—"I am free to confess that such steps, if taken, would in my opinion be accompanied with considerable risk as to costs, and with more than a strong chance of a futile result." On this opinion the Bank acted, and I think they were right in doing so. I say this not merely because it was the opinion of their responsible legal adviser, but also because it seems to me to have been a sound opinion. Doctor Menzies was said to be making a comfortable income from his practice in Buenos Ayres (Lattey's letter of 17th May 1872); but he had been but a short time settled there, and it was "impossible" as Mr. Lattey observes (in his letter of 23rd August 1872) "to assume that he had any assets" to speak of there, and even if he had they might be difficult to get at. He was a man who had contrived to elude his creditors even when within the reach of British law. What prospect was there of getting anything out of him in an unknown country, where it would be necessary to employ agents recommended at second or third hand, and if anything was to be got out of him, would it be enough to defray the costs? I have no hesitation in saying that the Bank, in abandoning the attempt to recover from Dr. Menzies at Buenos Ayres, took the wisest course, and the course which was best, not only in their own interest but also in the interests of the sureties. But it is argued for Dr. Morice that the Bank might, at all events, have sued Dr. Menzies in this country. I think the

answer to this is that when the Bank first got a clue to Dr. Menzies in Guernsey, after his flight from India, the simplest plan was to institute proceedings against him there, as they arranged to do, and after their attempt to institute proceedings against him there was defeated by his flight to the continent, I do not see what there was to be gained by instituting a suit against him in this country.

It may well be doubted, looking to Mr. La'itey's letters of the 14th and 21st of April 1871, whether it would have been possible by any amount of exertion to have effected service of a summons upon him at that time, and 3 or 4 months later (*viz.* on the 8th August 1871) he was declared a bankrupt in England. When he left for Buenos Ayres does not appear, but it is quite clear it would have been mere waste of money to institute a suit against him in India after he had been declared a bankrupt in England. There would have been no property in England to execute a decree against; and as to executing a decree in Buenos Ayres, I have already said that I think the Bank were wise in abandoning the idea of instituting proceedings there.

It is thus, I think, clear, 1st, that the Bank were not, according to the principles commonly applicable to such cases, bound to take legal proceedings against Dr. Menzies; and secondly, that even if they were so bound, they are shown to have done all that a prudent man would venture to do under the circumstances. But it is argued that a special duty to proceed against Dr. Menzies was imposed on the Bank by the circumstance that the sureties repeatedly called upon the Bank to proceed against him. Now, it is true that the sureties after Dr. Menzies left India constantly urged the Bank to proceed against him. It will be sufficient, I think, to notice the correspondence which took place in April to June 1872.

Doctor Morice in his letter of the 27th April 1872, and again in his letter of the 23rd June 1872, urges the Bank to institute proceedings against Doctor Menzies, and says he and his co-surety, Captain Price, are willing to pay the expenses. In reply to this second letter the Secretary to the Bank writes on 28th June 1872—"I note that you are willing to pay the expenses of prosecuting Doctor Menzies at Buenos Ayres. I am now taking steps to have this done, but it must necessarily be a good many months before the result can be known." It may fairly be argued, I think, that if there was no duty incumbent on the Bank to prosecute their claim against Doctor Menzies before, such a duty was created by this correspondence. The question whether a creditor is bound to take proceedings against his principal debtor when called upon by the surety to do so, and whether, in the event of his omitting to do so, the surety would be discharged, is one which seems open to argument. It does not seem to have been much considered in England, but it is discussed at great length in a leading case in America (*King v. Baldwin*) and in the note to that case in Hare and Wallace's American Leading Cases, Volume II, p. 364 *et seq.* But it seems unnecessary to determine this question for the purposes of the present case, because, assuming that the Bank would not have been bound to comply with Doctor Morice's request if they had

chosen to refuse, I think that, as they on that request being made replied that they had noted Doctor Morice's offer to bear the expenses and were taking steps with a view to proceedings against Doctor Menzies, I say I think by this reply they took upon themselves the duty of prosecuting their claim actively against Doctor Menzies. I think whether a surety has or has not a right to insist on the creditor taking proceedings against the principal on being guaranteed his expenses, it is quite clear that if on the surety requesting the creditor to proceed and offering to guarantee the creditor replies "I note your offer to guarantee expenses and I am taking the necessary steps," it from that time forward becomes a part of the creditor's duty towards the surety to enforce his claim against the principal with all reasonable diligence; for, by giving such a reply, the creditor leads the surety to rely on him to do all that is required in that direction. But then comes the question, what was the nature and extent of the duty which the Bank took upon themselves by their reply in the present case? Not surely to proceed against Doctor Menzies without any regard to the prospect of success; not surely to go to the expense of appointing an agent at Buenos Ayres and instituting proceedings there, though it might be morally certain that they would be only throwing good money after bad. It might have been argued that they were bound to go this length if Doctor Morice's letters to them had told them distinctly that he wished proceedings instituted at any risk of failure; but his letters do not tell them this. In his letter of the 23rd of June, in which he is more explicit than in his previous letters as to what he wishes done, all he says is—"As we cannot do anything ourselves, he (Doctor Menzies) not being indebted to us but to the Bank, we look to the Bank to take steps at once. I hope you will without delay send a power of attorney to your solicitors [in England] and urge them to do their utmost, either through the Minister of War, the Consul, or the Bank at Buenos Ayres, to prosecute Doctor Menzies. I heard lately from a friend of his that he was likely to get some appointment there."

This, as I say, must be construed, not as a request to proceed at any cost or any risk of failure, but only to do so if there was a reasonable prospect of success, and accordingly all that the Bank seem to me to have undertaken by their reply of the 28th June was to proceed if there was such a prospect of success. Now, at the moment this reply of the 28th of June was written, it appeared from the letters up to that time received from the Bank's solicitor in England that there was a possibility of realizing something from Doctor Menzies in Buenos Ayres; but two or three months later there came Mr. Lattey's letter of the 23rd August 1872, to which I have before referred and which, as I have already said, I think made it clear that to proceed against Doctor Menzies would be simply throwing good money after bad. Whether the Manager of the Bank sent a copy of this letter to Doctor Morice as he certainly ought, as a man of business, to have done, after the correspondence that had taken place between them in June, does not appear. From the circumstance that Doctor Morice is not shown to have made any enquiry subsequently as to what was being done, one cannot help suspecting that he knew that the

attempt to recover from Doctor Menzies had been abandoned as hopeless, and that he acquiesced in its being so abandoned. But, however, this may be, I think that the Bank best discharged the duty they had taken upon themselves in their letter of the 28th of June 1872 by leaving Doctor Menzies alone.

I may add that, even if we were to hold that the Bank had, by their letter of the 28th of June, undertaken absolutely and at all risks to proceed against Doctor Menzies, still their neglect to do so would not release Doctor Morice, unless it could be shown that Doctor Menzies was then solvent and has since become insolvent; but so far is this from being shown that it appears Doctor Menzies had at that time just passed through the Bankruptcy Court in England, and may at this moment for aught we know be in better circumstances. On these grounds, I hold that the Bank were not, under the general rules regulating the duties of a creditor to a surety, or under their undertaking in the letter of the 28th June 1872, bound to do more than they did towards realizing from Doctor Menzies; and accordingly that there is so far no ground shown for holding Doctor Morice to be discharged.

But it is further argued, and this brings us to Mr. Spitta's second point, that if the Bank were not bound to sue Doctor Menzies before, they ought, if they wished to keep their claim against his sureties alive, at all events to have sued before the claim against Doctor Menzies had become barred by lapse of time, inasmuch as once the claim against Doctor Menzies became barred by lapse of time, the claim against his sureties was extinguished. In his argument on this point Mr. Spitta relies on Section 134 of the Contract Act, or if that Act is held inapplicable to the present case, on generally received principles of law. Section 134 of the Contract Act provides that: "The surety is discharged by any contract between the creditor and the principal debtor by which the principal debtor is released, or by any act or omission of the creditor, the legal consequence of which is the discharge of the principal debtor."

Here, again, it seems to me unnecessary to consider whether the Contract Act applies to this case or not, inasmuch as the rule embodied in the Section I have just quoted is one which we should adopt and enforce in the absence of any statutory provision on the point. But the present case does not, I think, fall within that rule. No case has been cited to us in which a surety has been held to be discharged by the circumstance that the creditor has allowed his right of action against the principal debtor to become barred by a law of limitation like that in force in this country, and on principle it appears to me that the surety would not be discharged, for a law of limitation like ours does not discharge the principal or extinguish the debt but merely bars the remedy.

Mr. Spitta's two first points being thus disposed of, his third point, as to whether the Bank by accepting a dividend under Doctor Menzies' bankruptcy in England and assenting to his discharge, can be said to have, by their own act, released Doctor Menzies so as to discharge his sureties also, remains. I can find nothing in the file of the case to show that Doctor Menzies has

obtained his discharge in the Bankruptcy proceedings; but as it has been taken for granted throughout the argument that he has, I shall assume that he has. Mr. Spitta, as I understand him, does not dispute the proposition that, ordinarily, a discharge of the principal debtor in bankruptcy does not operate as a discharge of his sureties (*Browne v. Carr*, 7 Bing. 508). He would, I presume, further admit that, even in a case where the bankrupt principal is discharged under a liquidation by arrangement or composition, and the creditor assents to such arrangement or composition, the discharge is still one by operation of law and the sureties remain liable (*Ellis v. Wilmot*, L. R. 10 Ex. 10; *Ex parte, Jacobs* L. R. 10 Ch., 211). What I understand Mr. Spitta to contend is this: He says the English Bankruptcy Acts do not extend to this country by their own vigour. They are to our Courts here a foreign law, and if they are given effect to here at all, it is only by a sort of comity; assuming this to be so, he argues that our Courts would not, as a general rule, recognize a discharge in an English Bankruptcy Court as having any effect upon a debt like Doctor Menzies contracted to an Indian creditor in India; but (and for this he refers to some cases cited in Story's Conflict of Laws, S. 341) our Courts he says would admit an English discharge to be a release from such a debt if the creditor, by proving the debt and accepting a dividend in respect of it (as the Bank did in the present instance) assented to the discharge. If Mr. Spitta is right in all this, he would be in a position to contend that Doctor Morice had been discharged, not by act of law, but by the act of the Bank, and there would perhaps be something in his contention, for the case of a creditor attracting by his own voluntary act the operation of a law which, if it had not been for such act would be allowed no effect on his debt here, would be materially different from the cases above referred to of a creditor assenting to a discharge under a Bankruptcy law applying by its own vigour. But it is unnecessary to consider the question thus raised, inasmuch as the first and chief assumption on which Mr. Spitta's argument rests appears to be erroneous. It does not seem to be the case that the discharge in England would be recognized by our Courts in this country as a release of Doctor Menzies' debt to the Bank only if the Bank accepted a dividend under the English Bankruptcy. On the contrary, it seems to be established by authority that the discharge under the English Bankruptcy would be given effect to in this country irrespective altogether of anything the Bank might say or do.

In the case of *Edwards v. Ronald* (1 Knapp, P. C. 259) it was held that an English discharge in bankruptcy barred an Indian creditor from recovering in Calcutta a debt contracted there, and this though the creditor had had no notice of the proceedings in Bankruptcy. Again, in the case of *Gill v. Barron* (L. R., 2 P. C. 175) it appears to have been taken for granted throughout that a discharge in Bankruptcy in England would itself, and without any regard to what the creditor might say or do, be a bar to the recovery in Barbadoes of a debt contracted there. The view taken in these cases perhaps rests, not on the ground that the English Bankruptcy law was, from the point of view of the Colonial Courts, a foreign law, which these Courts

would give effect to as a matter of comity, but on the ground that the particular English statutes there relied on would, when properly construed, extend to the colonies *proprio vigore*, and bind the Court there (*Westlake's Private International Law*, S. 257).

It seems to me, however, immaterial on which of these grounds we suppose the Courts to have proceeded, for even if we assume them to have proceeded on the latter ground, the cases will still be an authority binding on us in the present case, inasmuch as the Bankruptcy Act of 1869 under which Doctor Menzies appears to have obtained his discharge is, as far as the clause declaring the effect of a discharge goes, quite similar in its terms to the Bankruptcy Act of 1849 under which *Gill v. Barron* was decided, and also, as far as I can make out, (for I have no copy of the statutes to refer to here) to the older statute under which *Edwards v. Ronald* was decided.

Mr. Spitta contends that the 2nd Section of the Act of 1869 shows that it cannot have been intended to bind Colonial Courts in this way; but the Act of 1849, under which, as I have just said, *Gill v. Barron* was decided, contains a precisely similar provision, and it may be that the limitation imposed by it is to be construed as merely fixing the local area within which the machinery created and regulated by the Act is to be set up and worked.

The result is that Doctor Menzies' discharge under his Bankruptcy takes effect here without reference to anything the Bank may have said or did; that Doctor Menzies is discharged in this country just as he was in England, not by the act of the Bank but by operation of law; and that accordingly, his discharge does not carry with it a release of his surety, Doctor Morice. All the grounds put forward by the appellant having thus, in my opinion, failed, I would dismiss this appeal with costs.

SMYTH, J., concurred.

No. 3.

RATTA RAM,—(Plaintiff),—APPELLANT,—

Versus

MUSSUMMAT NANO,—(Defendant),—RESPONDENT.

} APPELLATE SIDE.

Case No. 421 of 1877.

(FITZPATRICK, PLOWDEN AND SMYTH, JJ.)

Limitation—Art IX of 1871, Section 20 and Schedule II, Article 62—Account stated—New contract.—Held, by the Full Bench, that a statement of account does not give a fresh starting point unless, 1st, it is in writing and satisfies the requirements of Section 20, Act IX of 1871, or, 2nd, amounts to a new contract between the parties, in which case it furnishes a new cause of action.*

* This ruling was followed by Lindsay and Smyth, JJ., in Civil appeal No. 703 of 1877.

Regular appeal from order of Commissioner, Hissar, dated 21st December 1876.

Rattigan for Appellant.

Cullin for Respondent.

This was a claim to recover Rs. 881 principal and interest, balance due on accounts said to have been stated in Baisakh Sudi 10th, Sambat 1932. The Court of first instance found it satisfactorily proved that the account had been stated in the presence of Bakhta, deceased, husband of Mussummat Nano, defendant, who was sued as his representative, and accordingly decreed the claim.

The Commissioner on appeal considered that the accounts had not been stated with sufficient formality to bring the balance then struck under Article 62 Schedule II of the Limitation Act 1871; and, following the ruling in Case No. 14 *Punjab Record* for 1875, held that only those items which came within three years of the balance of Sambat 1932 could be decreed. He accordingly reduced the decree of the first Court.

The plaintiff thereupon appealed to the Chief Court.

The appeal came on for hearing before Lindsay and Plowden, JJ., who, with reference to the conflicting decisions of the Chief Court,* and the case in 7 *N. W. P. Reports*, pp. 105 and 284, which were referred to by appellant's counsel, sent the case to a Full Bench for decision of the following question :—

“Whether a suit based upon a balance struck in an account book is a suit to which Article 62 of Schedule II Act IX of 1871, applies; and does the striking of a balance bring within the period of limitation items which, but for the striking of such balance, would be barred?”

The following judgments were delivered after the reference to the Full Bench :—

25th Oct. 1877. FITZPATRICK, J.,—(after stating the question referred, continued)—I do not think this question admits of a simple direct answer, either in the affirmative or the negative. It is necessary to distinguish the different cases which may arise, but the point appears to me to present no difficulty, at least so far as this Province is concerned.

The class of suits to which Article 62 of the 2nd Schedule of the Indian Limitation Act of 1871 is intended to apply is described in that Article as follows :—“Suits for money payable “to the plaintiff for money found to be due from the defendant to “the plaintiff on account stated between them.” There can be no doubt as to the source from which the draftsman borrowed his phraseology. The wording is that of the common count on an account stated in vogue in England, and if in any place in which the

* No. 14 *Punjab Record*, 1875.

No. 6 Do. 1877.

Small Cause Court Reference No. 2 of 1877 (unpublished.)

Act is in force an action on an account stated co-extensive in its application with the English action on an account stated is known to the law, the construction of the article there may be, I do not say a matter of difficulty, but a matter requiring some little consideration.

The stating of accounts between parties may or may not, according to the nature of the account and the circumstances of the case, amount to what, as a matter of plain common sense and reason, would be seen to be a fresh contract express or implied between them, to what I shall call an actual fresh contract between them.—(See 7 *Madras High Court Reports*, pp. 200 and 201.)

But the action on an account stated in England is not restricted to cases in which the statement of account involves an actual fresh contract. It is available in cases where the statement of account amounts to no fresh contract except by what is sometimes termed an "implication," but what would more properly be called a mere fiction of law, to all cases in fact where there has been an absolute acknowledgment of a debt. Thus, if I buy a walking stick for a shilling, and, on the bill being subsequently presented to me, I acknowledge it to be correct, that is, as I understand, an account stated, and the seller, if he wants to recover his shilling, may found an action on it, as such.

Now, if in any place to which the Act applies an action on an account stated can be brought in a case of this description, it might be contended with some show of reason that Article 62 of the Act applied to it; and if it were held that this Article did apply, the awkward result would follow that Section 20 of the Act would be rendered to a great extent, if not altogether, inoperative, inasmuch as a plaintiff who had obtained an oral acknowledgment of his debt could treat such an acknowledgment as giving him a fresh cause of action on an account stated on which he might sue within three years. The difficulty would be somewhat similar to that which arose in England in reference to actions on account stated after the passing of Lord Tenterden's Act. It would probably be got over by construing Article 62 as limited to the case where the statement of account amounted to an *actual* new contract, as distinguished from what would be a new contract only by a fiction of law.

But with us in the Punjab, the difficulty does not arise at all. We here would recognize no account stated as an independent cause of action except the statement of the account involved a novation, or in other words amounted actually and as a matter of plain common sense and reason to a fresh contract. No one I suppose would contend that a mere acknowledgment of a debt would have afforded an independent cause of action in this Province at the time the Limitation Act was passed; and if it did not, the Limitation Act cannot be supposed to have made such an acknowledgment an independent cause of action; for the object of the Act was, not to alter the substantive law or to create new remedies, but merely to prescribe periods of limitation in respect of remedies which it assumes to exist and be available.

The only action on an account stated in this Province being thus the action on a statement of accounts, which involves an

actual fresh contract between the parties, and there being no other action here to which Article 62 of the Schedule to the Limitation Act can apply, the construction of that Act here is simple enough.

When a statement of account amounts to no more than an acknowledgment, the plaintiff can avail himself of it, if at all, only as extending the time under Section 20 of the Act for suing on his original cause of action. Where, on the other hand, the statement of accounts amounts actually to a fresh contract, the plaintiff can sue on that fresh contract, and Section 20 has no application whatever. Whether a statement of accounts does or does not amount to a fresh contract must depend to a great extent on the nature of the accounts, the mode in which the statement is made, and the other circumstances of each particular case. In so far as this question is one of law, it belongs to the law of contracts, and not to that of limitation, with which latter alone we are concerned on the present reference. I would answer the question put to us by saying that when the striking of the balance amounts to a fresh contract, Article 62 applies, and that in other cases it does not. It need scarcely be added that when the striking of the balance amounts to a fresh contract, good and valid under the law for the time being in force relating to contracts, and a suit is brought upon such fresh contract, no question arises as to particular items in the account,—all claims to particular items being merged in the single claim upon the new contract.

PLOWDEN, J.—The first question is: “Whether a suit based upon a balance struck in an account book is a suit to which “Art. 62 of Schedule II of Act IX of 1871 applies?”

In my opinion the general question proposed admits of a brief and satisfactory answer. The answer is, that in the Punjab no suit to recover money as found to be due upon a balance being struck between the parties, is a suit within the meaning of Article 62 of Schedule II of Act IX of 1871, unless it appears that the particular transaction is recognized by the law prevailing here, as constituting a cause of action, upon which a suit to recover the amount of the balance may be maintained.

The outline of the argument addressed to us was this:—Art. 62 contains *verbatim* the form of declaration prescribed in the English law for the action known as an action “upon an account stated.” If the circumstances of a given case be such as would in England support an action for the balance of an account, brought in the form of an action upon an account stated, a suit brought here with the same object falls within the scope of Art. 62.

This argument seems to me to be founded in error. It overlooks the fact that in the Mofussil, or to be more precise in the Punjab, the English law as to what constitutes a right of action, and as to the mode in which it is to be pursued, that is, the law of pleading, including therein the law regulating forms of action, never has been and is not now in force. In the Punjab, nothing is known of forms of action as such. There is, strictly speaking, only one form of action, *viz.*, that prescribed in the Code of Civil Procedure for civil suits generally. Under this general

form, every kind of action cognizable in a Civil Court may be brought for which no special form is ordained by law. The characteristic difference of the various actions that may be brought in the one general form lies in the particular cause of action, which should be stated in the plaint and which it is essential to ascertain with precision, in order to apply the law whether it concern rights or procedure appropriate to the particular case. Actions classified or distinguished upon this principle are classified or distinguished according to their substance, and not according to their form; and it may be said generally of the Mofussil system and practice, that as regards procedure, the substance and not the form of the proceeding is, as it ought to be, the principal thing regarded. It was not the object or the effect of Act IX of 1871 to introduce rules of pleading or prescribe forms of action or to declare or define the elements of a right of action. These are matters with which the Act is only indirectly and remotely concerned. The Act assumes that the plaintiff has a right to sue, and its object in Schedule II is only to fix the period within which the right may be exercised, and the date from which the period shall be reckoned.

In order to discover what Article of the Schedule applies for the limited purposes just mentioned to a particular suit, the substance of the action is the chief thing to be regarded, and not its form. In suits to recover money found to be due upon striking a balance, it will depend upon the circumstances of the case whether the particular transaction sued upon availed in itself to give a right of action. This question will I think be found generally (it may be universally) to resolve itself into a question whether the transaction amounted to a valid contract to pay the amount found to be due, a question to be answered with regard to the general law in force in the Punjab relating to the constituent elements of a contract, and to the form of a contract in certain cases. It will probably be found, the fundamental principles of the law of contract in India and in England being the same, and the fundamental principles of the law relating to rights of action being the same, that in the majority of cases where a suit to recover a balance found due upon taking an account is maintainable in England it is also maintainable here. This is not the same thing as to say that it is so in *all* cases, or to say, as was in effect urged for the appellant, that because a particular action would be maintainable in England in a certain form, and the Indian Limitation Act recognizes the possibility of an action being brought in the same form here, the fact that the particular action is capable of being laid in that form is the first or only thing to be regarded for the purpose of applying the Limitation Act, and the substance of the action is a subordinate or immaterial matter.

It is not necessary, I think, upon the present reference to state, even by way of illustration, what cases of stating an account would fall within the rule laid down in the proposed answer. They should, I think, be left to be dealt with as they arise.

It only remains to add that no cases appear to have been decided exactly in point. In the cases cited from the North

West Provinces Reports it was assumed rather than decided that Art. 62 was applicable to the case before the Court. In the Bengal case there was a mere dictum, which cannot be treated as an authority.

The second question is: "Whether the striking of a balance 'brings' within the period of limitation items which, but for the 'striking of the balance, would be barred?' If the striking of the balance is a transaction which constitutes a new cause of action, the question of limitation is whether *that* cause of action is barred, and no question arises as to whether items in the account prior to the striking of the balance are time-barred. If the transaction does not give rise to a new and independent cause of action its effect will depend upon such a variety of circumstances that the question as put scarcely admits of being answered, and I think it need not be answered except as above in connection with Art 62.

SMYTH, J.—I consider that a balance struck in an account book and acknowledged by the debtor to be correct is a statement of accounts within the meaning of Art. 62 of Schedule II of Act IX of 1871, and that, if a suit upon such balance is maintainable, the period of limitation for it is that prescribed in the above Article.

But of course it does not follow that because Article 62 of the Schedule has specially provided a period of limitation for suits upon stated accounts, a suit upon a balance struck in an account book is always maintainable. The Limitation Act assumes that certain kinds of suits may be brought, but it does not attempt to define the circumstances under which any suit may be brought, or in other words, what constitutes a cause of action.

The real question, therefore, which the reference from the Division Bench appears to me to raise is, whether a suit will lie upon a balance struck in an account book, that is to say, whether the striking of a balance constitutes a new cause of action.

The original cause of action arises when the items are received by the debtor, and if the prescribed period of limitation is allowed to elapse without a suit being brought to recover the debt, any right of suit which the plaintiff may subsequently possess can arise only in one of two ways, *viz.*, by showing that his original right has been kept alive by a written acknowledgment or promise within Section 20 Act IX of 1871, or that a new cause

1 Agra. F. B., 94.

No. 45 P. R. for 1870.

of action has arisen under a new and distinct contract.

The mere striking of a balance or the oral acknowledgment of its correctness would of course not be such an acknowledgment as is required by Section 20 of the Limitation Act; and unless the adjustment of the account amount to a new and distinct contract it would not constitute a new cause of action, or avail to give the plaintiff a fresh starting point in respect of limitation.

I do not think that any general rule can be laid down as to the circumstances under which the striking of a balance or other statement of accounts would amount to a new contract. In case No. 45 of 1870, this Court observed that—"It is we think impossi-

“ble to allow the ordinary legal implication of a promise to pay arising from an admission of indebtedness so to operate or to constitute a new contract, and so start another period of limitation, distinct from that contemplated by the Act.” The question as to what, in such cases, would constitute a new contract is one which, in my opinion, should be determined under the contract law, upon a consideration of the particular circumstances of each case, such as the nature of the settlement, what was the consideration, &c.

With regard to the second part of the question referred by the Division Bench, *viz.*, whether the striking of a balance brings within the period of limitation items which, but for the striking of such balance, would be barred, I am of opinion that if the items are barred at the time of the striking of the balance, the striking of the balance would not bring them within the period unless (as provided in Section 25 of the Contract Act) it amounts to a promise made in writing and signed by the debtor or his duly authorized agent to pay the items. If the items are not barred at the time of the striking of the balance, then the remarks made above in answer to the first part of the question apply.

LINDSAY AND PLOWDEN, JJ.—This case has now come back to us from the Full Bench.

The question for decision in our opinion is this: “Did the striking of the balance on Bysak Sudi 10th, 1932, amount to a binding contract on the part of the deceased to pay the amount of the balance then struck.” If it did, then it is immaterial that some of the items of the account then balanced were items of debt incurred more than three years before the balance was struck.

We are quite unable to understand the figures in the judgment now under appeal, and the books are not before us. We think the best course is to return the case to the Commissioner's Court in order that he may, after questioning the parties and taking such further evidence as he may consider necessary for the purpose of deciding the above issue, come to a finding upon it and return the case to this Court.

NO. 4.

PANA LALL,—(Defendant),—PETITIONER,—

Versus

ALA DIA SHAH,—(Plaintiff),—RESPONDENT.

} REVISION SIDE.

Case No. 772 of 1877.

(PLOWDEN, J.)

Act IX of 1873, Section 4—Act XVII of 1877, Section 39—Second regular appeal in suit of the nature cognizable by a Small Cause Court under Rs. 50 in value—Pending appeal.—A second regular appeal was presented to the Additional Commissioner, Jalandhar, under Act IX of 1873, in a suit under Rs. 50 in value, of the nature cognizable by a Small Cause Court, but was heard and determined after Act XVII of 1877 came into

force, which repealed the former Act, and (in Section 39) excepted from the benefit of the general provision as to second regular appeals in Small Cause Court suits under 50 rupees in value. *Held* that Act XVII of 1877 did not take away the jurisdiction of the Court over a pending appeal in such a suit.

Kali Prosono Roy for Petitioner.

The facts are sufficiently stated above.

This was a petition under Section 622 Act X of 1877 (Civil Procedure Code) for revision of the order of the Additional Commissioner, Jalandhar, on the ground that he had no jurisdiction to decide the appeal after the passing of Act XVII of 1877. The petition was rejected at a preliminary hearing by the following order of

5th Decr. 1877.

LOWDEN J.—I think the Commissioner had jurisdiction to hear the appeal. It was filed under Act IX of 1873, and was to be disposed of under Act VIII of 1859, which continued in force as to appeals presented before Act X of 1877 came into force. Under that Act it was the duty of the Court to dispose of the appeal, which under Act IX of 1873 had come under its cognisance. Act IX of 1873 fulfilled its office as regards this appeal by permitting it to be presented to the Commissioner's Court. Once admitted, the repeal of Act IX of 1873 did not in any way affect the decision of the appeal; for that the Code of Civil Procedure would provide, whether or not Section 4 of Act IX of 1873 had been enacted or continued to be in force.

The repeal of Act IX of 1873 prevented any more second regular appeals being presented thereunder; and from the date of its repeal, by Section 39 of Act XVII of 1877 no such appeals will in future be permitted in cases of the kind under notice. But there is nothing in Act XVII of 1877 to take away the jurisdiction of the Court over a pending appeal. From that date cases of certain value are to be excepted from the benefit of a general provision which, in other respects, is to be continued. This cannot be construed to take away any existing authority to decide appeal cases instituted before Act XVII of 1877 came into force.

The cases cited of my decisions in respect to cases instituted in this Court under Act V of 1866, and pending in this Court when the new Code of Procedure came into force, are not in point. A special jurisdiction had been conferred to try a particular class of cases in which there was a peculiar procedure, up to a certain point, at least, which in neither of those cases had been reached.

The new Code took away the jurisdiction of this Court, as I held, after consulting my learned colleagues, over such suits. We thought that Section 3 of the new Code applied only to cases over which a Court had jurisdiction, and the omission to include the Chief Court among the Courts empowered to try suits under Act V of 1866, amounted to depriving this Court of its jurisdiction over such cases altogether; and that the saving of the procedure of Act VIII of 1859 as to pending suits, contained in Section 3 of the new Code, did not operate to continue that jurisdiction over a pending suit of that kind.

I reject this application.

No. 5.

BEECHY,—(Plaintiff)—

Versus

FAIZ MAHOMED,—(Defendant),

} APPELLATE SIDE,

Case No. 11 of 1877.

(LINDSAY, PLOWDEN AND SMYTH, JJ.)

Act XX of 1865, Section 39—Contract Act (IX of 1872). Sections 10 and 23—Agreement by Pleader for extra remuneration contingent on success—Public Policy.—Held by the Full Bench, that the effect of Section 39 of Act XX of 1865 is not to restrict the power of a pleader and client to settle by private agreement the remuneration to be paid to the former by the latter for professional services, but to leave them at full liberty to make such agreements, subject to the provisions of the general law of contract.

The validity of such an agreement when called in question must be determined by applying the tests prescribed in the Contract Act, 1872.

Held, further by the Full Bench, that an agreement between a pleader and client regarding the remuneration for professional services of the former in conducting a legal proceeding for his client in Court, which stipulates for payment to the pleader, in addition to a sum to be paid in advance, of a further sum conditional upon success, is not void as being opposed to public policy, merely because it contains such a stipulation.

Circumstances affecting the validity of such agreements considered.

The decision of the majority of the Full Bench in Civil Judgment No. 26, *Punjab Record* for 1874, regarding the operation of Section 39, Act XX of 1865, dissented from.

Case referred by Judge Small Cause Court, Jalandhar, under Section 22 Act XI of 1865.

Kali Prosono Roy for defendant.

The following judgments were delivered :—

LOWDEN, J.—This is a Small Cause Court reference in a suit which has been twice tried, the decision on the first occasion being in the plaintiff's favor, and this reference being made at the second trial.

The case has been twice stated by the Judge making the reference, and the material portion of the first statement is as follows :—

“In January last, Faiz Mahomed engaged the services of Mr. Beechy for the prosecution of a criminal charge preferred on the part of Faiz Mahomed against his wife of having absconded with a large portion of property, valued at Rs. 8,200, and agreeing to pay Mr. Beechy Rs. 350 for his professional services. Of this amount Rs. 150 have been paid, the balance Rs. 200 Mr. Beechy sued for. Faiz Mahomed urged before the Court that the promise to pay the balance was contingent upon the case being brought by Mr. Beechy to a successful issue, *i. e.* when

“ Faiz Mahomed got the property back. Mr. Beechy having subsequently refused to proceed with the case unless more than the stipulated amount was paid, Faiz Mahomed engaged the services of another pleader, consequently the amount claimed was not due. On the issues framed, the Court found that the promise to pay the balance was in no way contingent upon the success of the prosecution. Faiz Mahomed being unable at the commencement of the suit to tender the whole sum agreed upon, promised to pay the balance out of the property which he expected to recover through the instrumentality of Mr. Beechy, in whose favor the Court passed a decree.

“ The case was re-opened on the application of Faiz Mahomed under Section 21 Act XI of 1865, for a reconsideration of the point urged by defendant, that the original judgment of this Court was passed without reference to Chief Court's ruling No. 26 of 1874 on contingent contracts entered into by pleaders with their clients. That ruling was by a Divisional Bench holding opposite views. It is clear that the agreement between the parties in the present case was that ‘ the balance of the fee would be paid to plaintiff (Mr. Beechy) if defendant (Faiz Mahomed) succeed in recovering the stolen property,’ or in other words a promise to pay defendant upon a certain event happening as defined in Section 31 of Act IX of 1872. An agreement in these terms is capable of more than one construction, as will be observed from the ruling cited above, and hence difficult of application to the question under reference. It may mean that you pay your pleader for his success and not for his work, or it may mean that his success is the only thing that will put you in pocket to pay for his work. The legality or illegality of the contract turns on the question whether or not Faiz Mahomed (defendant) led Mr. Beechy (plaintiff) to believe that his means of paying depended upon his recovering the property stolen. It should be stated that the recovery of the property and not the conviction of the accused was the point on which payment of the fee depended. It does not appear that Mr. Beechy was led to believe that the stolen property was the only source from which Faiz Mahomed could pay for Mr. Beechy's professional services, and on this ground the Court is of opinion that the contract is one which according to the ruling already cited should be regarded as illegal.”

The second statement, which must be read with the first, is as follows :—

“ The agreement with regard to payment of the balance was that the money was to be paid if ‘ Faiz Mahomed succeeded in his case’ (*bad fatehyab hone ki*). That Mr. Beechy was not led to believe that the stolen property was the only source from which Faiz Mahomed could pay him the balance of his fee, and that hence the payment of that balance was made contingent not because Faiz Mahomed had no means of paying him until the property was recovered, which would have been a lawful agreement, but it was made simply contingent upon the success of Faiz Mahomed's case.”

It is to be observed here that I understand "the success of the case" to mean, as distinctly expressed in the first statement, "the recovery of the property, and not the conviction of the accused." The statement then concludes thus :—

"The question referred is whether according to Chief Court's ruling No. 26 of 1874, the agreement was a lawful one that the balance of the fee was to be paid if Faiz Mahomed succeeded in his case."

The consideration of this question has been referred to the Full Bench by the order of a Division Bench of this Court, with a view to a reconsideration of the ruling of the majority of the Judges in the case cited by the Judge of the Small Cause Court.

It is necessary therefore to examine carefully the judgment in that case delivered by Mr. Justice Boulnois, in which Mr. Justice Melvill concurred, and which prevailed as containing the opinion of the majority of the Court, and especially the reasoning upon which the judgment is founded.

Three appeals were disposed of in the single judgment, but it is unnecessary for present purposes to state the facts of any but the first of them.

Those facts are thus set out by Boulnois, J. :—

"The plaintiff claims on a written agreement entered into by him as a pleader to conduct and defend a criminal case then pending against the defendant Gholam Ghous, who paid Mr. Beechy Rs. 100 and promised that he would when he should be acquitted pay Rs. 400 more. It is important to note that the payment of Rs. 100 took place while the promise to pay Rs. 400 remained a conditional one, contingent upon the acquittal or discharge of the accused taking place."

The agreement between the parties is then set out at length. The gist of it that 'the client has engaged Mr. Beechy, (pleader) to conduct and defend the case on agreeing to pay him Rs. 500, of which Rs. 100 has been paid in advance and the balance Rs. 400 is to be paid upon the client's acquittal or discharge, the payment being conditional on acquittal or discharge.'

The learned Judge commences his judgment upon this foundation. "The office of pleader," he says, "in the Indian Courts is the creation of the Legislature, and the pleader's rights and duties must be determined with reference to the express language of the latest enactment governing them. To seek for analogies in what a barrister or attorney duly admitted to practice in a High Court may do, is not necessary, although a reference to the authorities which declare the rights and duties of persons practising those professions, shows how distinct are the rules relating to their payment. The barrister cannot enforce at law a contract to pay him at all, the attorney must tax his bill of costs, and looking to the language of the Act which consolidates the law relating to pleaders, it at once appears that they are not empowered to make any and every imaginable contract in relation to what transpires in Courts of law, but they are limited to this: they may agree with the

"parties employing them in any Court, as to 'the remuneration to be paid for their professional services,' see Section 39 of Act XX of 1865."

The question is then put whether the agreement before the Court is strictly within the terms of Section 39.

The learned Judge answers this by saying that the client, "in making a contingent contract to pay in addition to Rs. 100 down Rs. 400 more, such payment to be conditional on the pleader's success, is departing from the strict line of settling with him the remuneration for his professional services."

The learned Judge then proceeds to lay down this rule, that "any agreement by a pleader unauthorized by Act XX of 1865 Section 39 is necessarily opposed to public policy. The law allows the pleader's intervention in suits expressly on the terms that he conforms to the rules of the enactment under which he exists, and on no other terms, and to widen or extend them would be contrary to the law and contrary to public policy."

After referring to some previous decisions of the Court the judgment concludes with this remark: "Adherence to the literal meaning of Section 39 of Act XX of 1865 appears to me to exclude permission to settle a pleader's remuneration indirectly by making it contingent on his success."

The rationale then of the decision appears to be this:—

"The office of pleader is the creation of the Indian Legislature, and a pleader has a limited capacity to contract with his client for remuneration for his professional services. The limits of that capacity are prescribed in Section 39 of Act XX of 1865. Any agreement unauthorized by that section is necessarily opposed to public policy: and that section rightly construed excludes permission to settle a pleader's remuneration indirectly by making it contingent on his success."

The final conclusion is that such an agreement is void, because under section 23 of the Indian Contract Act every agreement is void of which the object or consideration is unlawful, and the object or consideration of an agreement is unlawful "if the Court regards it as immoral or opposed to public policy."

It is important to observe that the decision rests upon a narrow and special ground, *viz.*, that such an agreement as is condemned being one not permitted by the enactment in Section 39 of Act XX of 1865, is *therefore* contrary to the policy of the law and *therefore* contrary to public policy, and *therefore* void. It is not laid down that such an agreement is void as being contrary to public policy on any broad consideration of what public policy requires, but only on the ground that it contravenes one of the provisions of Act XX of 1865.

Now it is beyond question that the office of pleader is the creation of the Indian Legislature. It may further be conceded that if the main proposition involved be granted, *viz.*, that the capacity of a pleader to contract with his client regarding remuneration for professional services is derived from and limited by

Section 39 of Act XX of 1865 :—an agreement not within the authority granted by that section is void as being against the policy of the law, and therefore against public policy. At the same time, it is most material to point out that the correctness of the fundamental proposition is assumed throughout the judgment, without any attempt to show that it is correct.

If however it be shown that this proposition is incorrect and proceeds upon a misapprehension of the object and effect of Section 39 of Act XX of 1865, (as I think can be shown), the incorrectness of the conclusion finally arrived at, in so far as it depends upon that proposition, will be established. In that event it will be competent to this Court, as it seems to me, to give an authoritative ruling based upon broad considerations of public policy as to the validity of agreements between a pleader and his client whereby the latter agrees to pay the former a sum of money conditionally upon the pleader's success in the client's cause.

I shall endeavour now, by following from its commencement the course of the law relating to remuneration of pleaders for their professional services, and by tracing the origin of Section 39 of Act XX of 1865, to ascertain the true meaning and effect of that Section. By so doing I hope to show beyond all question that that section does not operate to limit the capacity of a pleader to contract with his client regarding his remuneration, but was in fact intended to remove and did remove the last of the restrictions previously imposed by law upon the pleader's capacity in that respect, and was meant to leave and did leave him free to agree with his client for remuneration subject only to the provisions of the general law of contract.

The profession of *wakil* or native pleader in the Courts of the East India Company was unrecognised by the law before the year 1793. The preamble of Bengal Regulation VII of that year states that :—"It is indispensably necessary for enabling the Courts to administer and the suitors to obtain justice, that the pleading of causes should be made a distinct profession, and that no person should be admitted to plead in the Courts but men of character and education versed in the Hindu and Mahommedan law, and in the Regulations passed by the British Government, and that they should be subjected to rules and restrictions calculated to secure to their clients a diligent and faithful discharge of their trusts."

The Regulation then provided for the appointment of pleaders to plead causes in the Courts of *Diwani Adalat* from the *Sudder* down to the *Zillah* and *City Courts*.

Parties to suits were to be allowed the option of employing such of the pleaders as they might think proper, and by section 7 it was enacted that "upon a pleader agreeing to undertake the prosecution or defence of a suit, the party entertaining him is to present him with four annas as a retainer, which is to preclude him from being employed in the same cause against the person so retaining him. The retainer is to be exclusive of the fees specified in Section 9."

Section 8 provided for the execution and attestation of a vakalatnamah, and prescribed its contents.

Section 9 prescribed the fees payable to pleaders and the mode of calculating them, and provided for the giving security for such fees by suitors employing pleaders.

Section 10 prescribed the time when such fees should become payable, that is, on a decision being passed in the case. The fee was then to be forthwith levied from the parties by whom the decision might declare them to be payable.

By Section 14 pleaders were permitted to present petitions and make written motions for suitors, and to receive a fixed fee of four annas for each such act, payable when the order was passed. This privilege related only to suits in which they were not retained.

Section 19 enacted that "pleaders are not to demand or receive from their clients any fee or sum of money or any goods or effects or valuable consideration for pleading their causes, besides the fees that they are or may be expressly authorised to demand or receive by this Regulation or such Regulations as may be hereafter enacted." Breach of this prohibition might entail suspension and dismissal from office.

The law continued unaltered, except by one or two slight modifications for about 20 years, till a consolidating Regulation was passed in 1814 (Regulation XXVII.)

The prohibition against pleaders demanding or accepting from their clients any fee or valuable consideration beyond the fees authorised by the Regulation was continued (Section 6.)

Agreements between pleaders and their constituents for paying or receiving less than the established fees were declared to be void under severe penalties as regards the pleader (Sec. 7.)

The 20th Section "empowered vakils to receive fees for legal opinions," subject to the provisions of that section, by which a fee was fixed for opinions varying in amount with the grade of the Court to which the pleader belonged.

Some changes were also introduced as to the remuneration of vakils. The retaining fee was abolished (Section 21) together with the security heretofore required from a suitor for pleaders' fees, the suitor being now required, in lieu of security to deposit the amount of such fees in Court. Section 25 fixed the mode of calculating the amount payable as pleaders' fees in suits, and Section 29 provided for paying the fees out of Court, upon decision of the suit. Section 34 continued the privilege of receiving fees for petitions and motions, which by Section 35 were to become payable at such time as the parties might agree, the Court being empowered to award, under special circumstances, a larger fee than that paid by law. These fees if not paid were to be levied in the manner prescribed for execution of decrees.

It is thus apparent that pleaders were at first officers of the Court, remunerated through the Court, and incapacitated by express provisions of the law from making valid agreements with

their clients for remuneration for their services, either in conducting suits, or in giving legal opinions, a branch of business which they were first authorised to undertake in 1814.

The first step towards emancipating pleaders from the restrictions imposed upon them was taken in 1831. Section 7 of Regulation IX of 1831 authorised pleaders to settle with their constituents the compensation to be made them in respect of all acts not connected with cases, in which the Regulations did not require the fees to be deposited in Court.

But at the same time it was provided that "the amount of the compensation which shall be voluntarily agreed upon shall be specified in the vakalu tuamah," and should not exceed a specified limit.

The Courts were also empowered to reduce the amount agreed upon if it appeared large or exorbitant, and a discretion was given to them to refuse to levy the amount by process.

Here we find the thin end of the wedge introduced which was destined to open up a way to freedom of contract. The liberty now given, limited as it was, was in its exercise subject to the supervision and control of the Courts.

After a very short period the first blow was struck upon the wedge, in Clause 5 of Section 2 of Regulation XII of 1833. In this—"Parties employing authorised pleaders in the Court of Sudder Dewani Adalat are declared at liberty to settle with them for the remuneration to be paid to them for their professional services, the amount of which shall be specified in their vakalatnamah, and they shall not be required to make any deposit in Court on account thereof, unless they wish to do so for the satisfaction of their pleaders." Then followed a proviso as to the pleaders' fees chargeable as between party and party.

By the same section it was enacted that "private engagements between parties and their pleaders when contested shall be enforced by a regular suit, and no miscellaneous application for that purpose shall be received in any Court."

Here a further step is taken in advance towards establishing freedom of contract, and this provision in favor of pleaders of the Sudder Court was made extendible to any Zillah or City Court (Section 4). The summary mode of recovering fees was thus abolished, and a regular suit expressly prescribed, while a check was still maintained upon the terms of the agreement between pleader and client, which were to be contained in an instrument filed in Court.

The last epoch in the course of legislation regarding pleaders is arrived at in 1846. Act I of that year, in Section 7, enacted that "parties employing authorised pleaders in the said Courts" (which seems to mean the Courts of the East India Company mentioned in Section 5) "shall be at liberty to settle with them by private agreement the remuneration to be paid for their professional services, and it shall not be necessary to specify such agreement in the vakalatnamah."

Section 8 enacted "that private agreements between parties and their pleaders respecting the remuneration to be paid for their professional services shall not be enforced otherwise than by a regular suit."

Section 9 enacted that notwithstanding previous enactments "persons taking legal opinions from authorised pleaders shall be at liberty to settle with them by private agreement the remuneration to be paid for such opinions."

This is a long stride, and the last. Full liberty to contract is conceded to pleaders of all grades, as regards fees for services in Court or for legal opinions. The control of the Courts over the amount and mode of recovery of the former class of fees is abrogated: as to the latter class no special remedy for their recovery had ever been prescribed.

The next and the last enactment to be noticed is the Act of 1865, an Act which consolidated and amended the law relating to pleaders and mookhtars, and is still in force.

It contains three sections under the title "Remuneration of Pleaders and Revenue Agents." The first two of them relate to fees as between party and party. The third, Section 39, enacts that "parties employing pleaders, mookhtars, and revenue agents in any Court or office, shall be at liberty to settle with them by private agreement the remuneration to be paid for their professional services, and it shall not be necessary to specify such agreement in the power under which such pleaders, mookhtars or revenue agents for the time being act. Such agreements shall not be enforced otherwise than by regular suit."

So far as this section affects pleaders it is a mere re-enactment of the law contained in the Act of 1846, with this difference that the liberty of contract now declared to exist extends not only to agreements for remuneration in respect of services in the Civil Courts, but in all Courts, including Criminal Courts, in which pleaders are by Section 11 of the Act expressly authorised to practise.

Lastly, by this Act, Act I of 1846 and Regulation XXVII of 1814 were repealed, the latter having repealed the Regulation of 1793.

Viewed in the light thrown upon the meaning of Section 39 by its history, I think it is quite clear that that Section, so far from placing any restrictions or limit upon the power of pleaders to enter into agreements with their clients regarding remuneration for their professional services, on the contrary affirms the removal of the disabilities and restrictions which by express provisions of the earlier law had at one time existed.

If the view above advanced of the meaning and effect of Section 39 of Act XX of 1865, the basis of the decision of this Court in case No. 26 *Punjab Record* of 1874, fails, and the conclusion there arrived at is left without anything to support it. It follows that unless there be some other special provision of law bearing upon that subject, questions as to the validity of agree-

ments between pleaders and clients for the professional remuneration of the former must be determined by reference to the general law of contract.

It is as well to notice briefly a provision of the law in force when the case now referred for opinion was instituted, under which restrictions might have been imposed upon the exercise by pleaders of their liberty to contract regarding remuneration.

The operation of Act XX of 1865 in the Punjab was by Section 51 of Act IV of 1866, the Punjab Chief Court Act, to be controlled by the operation of Sections 10, 11 and 12 of the latter Act. Reading together Section 12 and Section 44 of this Act it was in the power of this Court to control the contracts of pleaders with their clients as to remuneration for professional services. This power was advisedly and wisely conferred upon the Court with regard to the circumstances of the province at that time. But as a matter of fact, no rules were ever framed under Section 44 on this particular subject, and the enactment remained a dead letter until the repeal of the Act, by the recent Punjab Courts Act of 1877, which contains no corresponding provision.

There being then no special provision of law upon the subject, and a pleader and client being at liberty to settle by private agreement the remuneration to be paid to the former by the latter for professional services, the validity of such agreement when called in question must be determined by reference to the tests prescribed in the Indian Contract Act, which embodies the general law applicable.

Now by Section 10 of that Act all agreements are contracts, that is, are enforceable by law if they are made by the free consent of parties competent to contract for a lawful consideration and with a lawful object, and are not by the Act expressly declared to be void.

By Section 23 an agreement of which the consideration or object is unlawful is void, and the same section declares that the consideration or object is lawful unless it is of one of the kinds which this section describes.

Now the general question to be considered in proceeding to dispose of this case, is whether an agreement between a pleader and client regarding remuneration for the professional services of the former in conducting a legal proceeding for his client in Court is valid when it stipulates for payment to the pleader, in addition to a sum to be paid in advance, of a further sum conditionally upon the successful issue of the proceeding.

In order to avoid unnecessary complication of the question it is well to point out that it must be assumed that the agreement to which the question relates is in other respects unexceptionable: that is, that it is made by free consent and by parties competent to contract.

This assumption implies that no advantage has been taken by the pleader over the client in the formation of the agreement, and that the bargain is therefore as to the whole amount to be paid a fair and reasonable bargain. It also implies that the agree-

ment is not void for uncertainty of meaning. Further, it must be noted that the question refers to a single agreement made at one time, and not to a case where the pleader's fee having been once fixed, a subsequent agreement is made to increase his fee, a class of cases which would involve other considerations than those which affect agreements of the kinds referred to in the above question.

Lastly, it is to be observed that such agreements are not expressly declared to be void by the Act, unless they fall within Sections 23 or 24 or Section 30. This last section may also be eliminated, as, assuming that such agreements are agreements by way of wager, they can be treated under Section 23; a like remark applies to Section 24.

The answer to the question proposed then depends upon whether the consideration or object of such agreements is lawful or unlawful within the meaning of Section 23.

What then is the consideration of such an agreement? and what is the object of the agreement?

The pleader's undertaking is to conduct the client's case, and to conduct it to a specified successful issue. The client's undertaking is to pay in addition to a sum paid down a further sum of money upon the successful issue of the case. The promise of each party is the consideration for the promise of the other.

The object of an agreement I apprehend is generally speaking the object which is to be attained by the performance of the agreement, and the object of such an agreement as I am now considering is the conduct of the client's case to a successful issue and the payment thereupon of a sum of money in addition to that paid at the outset.

Now obviously a great deal may depend upon the nature of the successful issue of the case to which any given agreement relates, and this again must depend upon the nature of the proceeding. Thus the successful issue may be a decree in a civil suit for money, land, or other property, or the dismissal of a suit or appeal; or it may be a conviction or an acquittal in a criminal case, or an order by a Criminal Court for the restoration of property before it. The successful issue contemplated may even be the sentence passed upon an accused person.

Now it must be for the present purpose assumed that the successful issue contemplated by the agreement to which the proposed question refers is not unlawful in itself, and that no unlawful or immoral act is necessary or intended by the parties or either of them, with the knowledge of the other, to be done in the course of bringing the case to that issue. Upon the opposite assumption it would be useless to discuss the question, as obviously the agreement would be void.

Thus the question is reduced to whether such an agreement is void because its consideration or object ought in the Court's opinion to be regarded as opposed to public policy. In other words, is it opposed to public policy that a client should agree with his pleader that the former shall pay to the latter an

additional fee in the event of the pleader conducting the client's case by lawful means to a successful issue lawful in itself?

If this is opposed to public policy it must be for reasons connected either with the time for payment or the fact of success, or the character of the event which is deemed to constitute success.

It may be urged against permitting such agreements that public policy when rightly understood requires (a) that a pleader should not have a right to receive any payment for his services after the termination of his services, or (b) that a pleader should have no pecuniary interest whatever in being successful, or at least no such interest in bringing about results of a particular kind.

It can hardly be seriously contended that public policy requires that a pleader should have no right under any circumstances whatever to receive payment upon the termination of the case in which he is employed independently of its result. There can be no question that an agreement for a fee of a specified amount for the conduct of the case, part paid down and the balance to be paid on its termination in all events—win or lose—would be a valid agreement. I know of no reason why such an agreement should not be held as valid as any other agreement by which the payment of money is merely agreed to be deferred, or as an agreement for services for which a part or even the whole of the remuneration is to be paid when they have been rendered and not before.

The next question is the vital one, whether it is opposed to public policy that the pleader should have a pecuniary interest in the success of the case he conducts.

The question is one on which different opinions may well be entertained. My own opinion is that public policy does not require a sweeping rule that a pleader shall under no circumstances be permitted to have a pecuniary interest in the issue of a suit conducted by him. In deciding this question, the pleader and client are both to be considered, as well as the effect upon the public interest of permitting or prohibiting agreements which give a pleader a pecuniary interest in the cause he conducts.

The chief danger is that the pleader may be tempted by the reward in prospect depending upon his exertions, to conduct his case improperly, forgetful in his zeal for his own advantage of the obligations which he owes to society at large, and may resort to means to attain his end from which he would otherwise abstain. It would unquestionably be prejudicial to the public interest, as being a perversion of the course of justice, that pleaders as a class should resort to improper or unlawful practices.

If full liberty to contract for payment conditionally upon success were likely to lead to such practices it must be conceded that such contracts certainly ought not to be sanctioned by the Courts. The degree of probability of this evil consequence must however be taken into account together with the other modes of preventing or counteracting such a result, short of interference

with the freedom of contract accorded by the general law to the pleader and his client.

I think the danger may easily be exaggerated. No person can be admitted and enrolled as a pleader who does not bear a good moral character, and pleaders as a class have therefore characters to lose; moreover, their interest lies in avoiding conduct which may subject them to penalties under the Pleadings' Act or even to punishment under the Penal Code.

Again, their success in their profession depends upon the reputation they enjoy not only among suitors but with the Courts.

In the long run few things are more damaging to a pleader's reputation with the Courts and with the bulk of suitors than a suspicion that such success as he may achieve in his conduct of cases is due to unscrupulousness or questionable practices. The notoriety of success thus gained may for a time draw a few cases from clients of a bad stamp, but in the long run, as is obvious to any reflecting mind, questionable practices do not pay their way. A pleader's interest lies in being successful, but not in being successful by improper means, and the common sense of an educated body of rational men is likely to lead them to recognise this truth, even if their moral sense does not instinctively prompt them to avoid the use of improper means to attain success.

In regard to the client, the practice of permitting such agreements seems to me calculated to produce good effects without any admixture of evil. It is calculated to secure to him from his pleader a degree of zeal and diligence, of attention and promptitude in conducting his case in excess of that which would otherwise be devoted to it. So far as the client is concerned, I see no reason why on any ground of public policy the practice of permitting such agreements should be condemned.

There is another point of view from which to regard this question. The law allows full liberty of contract between pleaders and clients, but this freedom may be subjected to restrictions if the Courts think public policy requires it. Thus the Courts have a quasi-legislative power, to declare that certain contracts shall be deemed unlawful.

In exercising this power, it is proper to consider to what extent it is expedient to place restrictions upon the freedom of contract permitted by law. Any general practices existing among the persons to be affected by any rule laid down, their sentiments on the subject, and the probable consequences of the rule proposed for adoption, are also proper matters for consideration. And the soundest principle to adopt in framing a rule is to avoid one that interferes beyond what is necessary with the normal liberty to contract, and to mould it in such a form as shall give that liberty fair play within reasonable limits.

Now there is a class of agreements very closely resembling those under notice, which has recently been dealt with by the highest judicial authority connected with this country. In dealing with them, the Privy Council had to consider whether they were void or opposed to public policy, and to lay down a rule for

the guidance of the Courts of this country in disposing of cases in which the validity of such cases might come in question.

The agreements to which I refer are agreements by which a person not being a party to a suit advances money to another person for the purpose of litigation upon condition of sharing in the fruits of that litigation. The agreement to which the question under discussion relates closely resembles the agreements treated of by the Privy Council, the most important differences being that the latter were not agreements between pleader and client, and that in the former, the future payment is not always to be made, though very commonly it is, from the proceeds of the particular litigation. But the cases are sufficiently similar to render it instructive to refer at length to their Lordships' judgment, both to get at the substance of the rule they laid down and to mark the form of rule which they considered it expedient to adopt.

In effect the Privy Council held that agreements of the kind described not being by law forbidden in this country, as they are in England, the whole character of the bargain ought to be considered, and not the mere circumstance that the lender acquires an interest in the fruits of the litigation for the prosecution of which he contributes funds. It was open to their Lordships to rule in an unqualified manner that such bargains were opposed to public policy, but they carefully avoided laying down any such sweeping rule.

The decision to which I refer is reported at I. L. R. 2 Cal. p. 233. After reviewing all the chief decisions on the subject of all the High Courts in India, their Lordships held that the specific English law of maintenance and champerty had not been introduced into India. At the same time they said :—"It seems clear to us upon the authorities that contracts of this character ought under certain circumstances to be held to be invalid as being against public policy. Some of the circumstances which would tend to render them so have been adverted to in the two judgments of this tribunal already cited."

From the former of the judgments referred to, their Lordships had quoted this passage :—"The Courts seem very properly to have considered that the champerty, or more properly the maintenance, into which they were enquiring was something which must have the qualities attributed to champerty, or maintenance by English law: it must be something against good policy and justice, something tending to promote unnecessary litigation, something that in a legal sense is immoral, and to the completion of which a bad motive is in the same sense necessary."

From the second of the two judgments, their Lordships had quoted the following passage :—"With respect to the law of champerty or maintenance, it must be admitted, and indeed it is admitted in many decided cases, that the law in India is not the same as it is in England. The Statute

“ of champerty being part of the Statute Law of England, has
 “ of course no effect in the mofussil of India, and the Courts of
 “ India do admit the validity of many transactions of that nature
 “ which would not be recognised or treated as valid by the Courts
 “ of England. On the other hand, the cases cited show that the
 “ Indian Courts will not sanction every description of mainten-
 “ ance. Probably the true principle is that stated by Sir
 “ Barnes Peacock in the course of the argument, *viz.*, that admin-
 “ istering as they are bound to administer justice according to
 “ the broad principles of equity and good conscience, those Courts
 “ will consider whether the transaction is merely the acquisition
 “ of an interest in the subject of litigation *bonâ fide* entered into,
 “ or whether it is an unfair or illegitimate transaction got up for
 “ the purpose merely of spoil, or of litigation, disturbing the
 “ peace of families and carried on from corrupt and improper
 “ motives.”

I return now to the judgment from which I had already com-
 menced quoting before giving these two last extracts. Their
 Lordships continue:—“ We think it may properly be inferred
 “ from the decisions above referred to, and especially those of
 “ this tribunal, that a fair agreement to supply funds to carry on
 “ a suit in consideration of having a fair share of the property, if
 “ recovered, ought not to be regarded as being, *per se*, opposed to
 “ public policy. Indeed, cases may be easily supposed in which
 “ it would be in furtherance of right and justice, and necessary to
 “ resist oppression, that a suitor who had a just title to property,
 “ and no means except the property itself, should be assisted in
 “ this manner.

“ But agreements of this kind ought to be carefully watched,
 “ and when found to be extortionate and unconscionable, so as to
 “ be inequitable against the party, or to be made, not with the
 “ *bonâ fide* object of assisting a claim believed to be just, and of
 “ obtaining a reasonable recompense therefor, but for improper
 “ objects, as for the purpose of gambling in litigation, or of in-
 “ juring or oppressing others by abetting and encouraging un-
 “ righteous suits, so as to be contrary to public policy, effect ought
 “ not to be given to them.” I. L. R., 2, Cal., 257.

The cautious manner in which their Lordships dealt with the
 question of the validity or invalidity of agreements connected
 with litigation in their relation to the requirements of public
 policy, may serve as an example and a guide to this Court, when
 it is in a similar situation.

As I have already said, their Lordships were not dealing
 with the case of an agreement by a pleader, and the special con-
 siderations applicable to that class of agreements must be taken
 into account, and receive due weight; and to this part of the subject
 I will now revert.

Agreements in which part of the remuneration is to become
 due only on condition of success are in great favor with clients,
 while they are less so with pleaders for obvious reasons in respect
 to the latter.

In my own experience at the Bar I learned, and I know that others have learned the same from similar experience, that a native client is rarely thoroughly satisfied with any terms arranged between himself and his pleader, unless by these terms the pleader has a solid interest in success.

This sentiment exhibits a very shrewd knowledge of human nature, as well as a thorough understanding by the native client of his own interest. It is founded, I believe, not so much upon a distrust of the pleader's integrity or alacrity as upon a profound and well founded belief of the client that his case will be more zealously prosecuted if there is an inducement in prospect to an extraordinary degree of assiduity in conducting it. The client feels that such a bargain tends to identify the pleader's interest and his own, and to make the pleader regard and treat his client's case as his own; and I have no doubt that the client is right in what he believes. The pleader assents to a bargain of this kind chiefly because his client desires it. He would as a rule prefer an arrangement by which he would have a certain instead of an uncertain amount of remuneration, whatever the issue of the cause might be, even if that amount should be somewhat less than the whole amount to be received upon success, except when it happens that the pleader is of a speculative disposition. This contingency may I think be left out of account in considering whether such agreements ought to be held void, that is, in effect be wholly forbidden, because it is easy to check and restrain the play of a gambling disposition on the pleader's part, without resorting to a wholesale prohibition of agreements not open to exception on this score.

The consequences of permitting a practice which the client favors, and which the pleader only accepts reluctantly and because his client is disposed to insist upon it must be regarded. These may be two-fold. Agreements of the kind will be numerous, but they are likely as a rule to be voluntarily performed by the client. On the other hand, the pleader will always endeavour to secure his full remuneration without looking to the contingent payment, when circumstances permit of such an arrangement, and he will be naturally loath, in the rare instances when a client declines to perform his engagement, to enforce it by a suit. For in any suit by the pleader the whole transaction between him and his client will, as the pleader knows, be thoroughly sifted, and he will only succeed upon proof of the absolute fairness of the whole transaction, the burden of proving which will be upon him. The nett result then will probably be that arrangements of this kind will ordinarily be voluntarily performed, and will rarely be litigated, and when they are, will only be enforced against the client if proved to be wholly unexceptionable.

Now, I think a very strong case ought to be made for interfering with a practice which commends itself to the natives of this country, which is satisfactory and advantageous to them, and is not likely to promote unnecessary litigation.

The mere possibility that a pleader may occasionally be found, who will be tempted to misconduct himself for the sake of

his prospective reward and thereby pervert justice, seems to me a poor and insufficient ground for prohibiting a contract containing a stipulation which is in harmony with the ideas of suitors as a body, as to what is the most suitable and advantageous kind of agreement to enter into with their pleaders. The most politic course as it seems to me is for the Courts to recognise such agreements as lawful, and to be vigilant against any abuse in exercise of the liberty to enter into them. I do not think the Courts can expect to effect or will effect more than the prevention of abuses, and it is therefore inexpedient to attempt more, if indeed it be not positively mischievous to do so. If such agreements were to be absolutely prohibited by holding them to be void I have little doubt that they would notwithstanding be commonly entered into, and in the majority of cases would be conscientiously performed, that in a large proportion of cases where the client failed to perform his engagement, he would be in the wrong, that is, would be evading a morally just obligation, simply because he knew he could not be compelled to perform it by means of legal proceedings. Dealing with a question of policy, the probable consequences of the rule proposed to be laid down are a legitimate subject of consideration, and a regard to them influences me strongly against any rule condemning in a wholesale manner agreements between pleader and client for remuneration contingent upon success.

I am quite willing to admit after all that has been said, that the advantages and disadvantages of such a rule are somewhat evenly balanced, and that it is a question of nicety whether such agreements should or should not be declared to be opposed, in the Court's judgment, to public policy. If the law required in this

See 33 & 34 Vic. C. 28, on country, as I think it advantageously the subject. might do, that no agreement between pleader and client for remuneration should be enforceable by action unless it had been reduced into writing, I should have arrived with even less hesitation at the opinion which I now hold. But my own view upon the whole is that the considerations preponderate against laying down a broad affirmative rule that all agreements of the kind under consideration are void as opposed to public policy.

The rule then that I am prepared to assent to is merely a negative rule, namely that an agreement between pleader and client regarding the remuneration of the former for his professional services is not void as opposed to public policy, merely because it contains a stipulation that the pleader is to be paid an additional sum by the client on condition of his conducting the case to a successful issue.

Such an agreement I would hold to be *prima facie* lawful : but subject to the qualification, that the bargain is a fair one, and not such as it would be inequitable to enforce, that is, (to borrow the words of the Privy Council) not "extortionate and unconscionable" : that it is not of a gambling or speculative character : that it is not open to any such objection as would invalidate the agreement if made by a private person supplying funds to maintain the litigation, that is, tending to promote unrighteous litigation : and lastly, that the particular issue or event on which the right to

the future payment is contingent, is not of such a nature that it would be improper to permit the pleader to have a pecuniary interest in bringing that event about.

I think it would be found after experience of the general rule subject to these qualifications, that they are sufficient to guard against the abuse of a practice which it seems to me inexpedient to attempt to wholly suppress. If experience shows they are not, further qualifications can be added such as occasion may demand.

To obviate misunderstanding which may arise in the application of the rule as qualified, I think it is advisable to refer to some of the cases in which it will commonly be necessary to apply it.

In every case when a contract is sought to be enforced it is necessary to ascertain with as much certainty as possible the intention of the parties. Until this is done, it is impossible to say whether or not the agreement between them is valid or void, because it is not known what the substance of that agreement is. In ascertaining this the ordinary legitimate method of interpretation must of course be followed. Now there is a class of agreements which I think deserves special notice, because it affords a contrast to those to which the question proposed for solution refers, although the two classes bear a very close resemblance, and are often hard to distinguish.

I mean cases in which it is understood by both parties that the second payment, the one contingent on success, shall lie entirely in the option of the client, shall be in fact a mere gratuity or thank-offering, the obligation being simply a moral one, the debt a mere debt of honor. When both parties understand this, the payment cannot be enforced, not because the stipulation is opposed to public policy, but on the plain ground that the parties never intended to create any legal obligation and never intended that it should be enforced. This is the characteristic which distinguishes this class of cases from that to which my question refers. In the latter class it is understood by both parties and intended that the sum agreed to be paid shall be legally due as remuneration for services rendered, though it is to be payable only in the event of the services being successful.

The difficulty lies in discovering whether both parties intended the payment to be legally due or only morally due. And it arises from the two parties looking at the same stipulation from different points of view. Thus, suppose a case in which the agreement is to pay Rs. 100 down and Rs. 100 in the event of success. The client may honestly consider that 100 Rs. is fair remuneration for the services actually to be rendered, and may regard the second Rs. 100 as a sum to be paid merely by way of bounty or generosity, to be given or withheld at pleasure. The pleader may honestly consider that the whole sum of Rs. 200 will be only a fair if somewhat liberal remuneration for his services, whatever the issue may be (and it must be remembered that the degree of time and labor to be expended in a case is frequently a matter of uncertainty at the outset) and may regard the second Rs. 100 as a sum which he is to forego in the event of non-success, though he will be legally

entitled to it and have fairly earned it if he wins. Lastly, each of the parties to the agreement may believe if he mentally adverts to the point, that the other party views the matter in the same light as he does himself.

Cases of this kind are likely to occur frequently, and it will always be necessary, if the parties are not agreed as to their common intention, for the Court to determine what was or what must, for the purposes of the suit, be taken to have been their common intention. This will have to be determined primarily by reference to the language employed by the parties, and to the circumstances under which they came to an agreement.

Now I am disposed to think that the client as a rule regards the payment of the second sum as lying entirely within his option, subject to his own ideas of a moral or honorable obligation, and that the pleader as a rule knows this. The most common expression employed to describe the second amount promised is "*shukrana*." In any agreement where that expression occurs, which in its literal or primary sense imports a gratuitous payment, it is to be presumed I think, that both parties viewed the stipulation as the client would naturally be inclined to view it. The presumption is not, I think, conclusive, but might be rebutted by showing from the circumstances of the case that it was understood that the further payment should be claimable as matter of right in the event of success.

The other point I think it expedient to notice is the nature of the event, or issue upon which the further payment when claimable is to become due.

A Court in deciding a question as to the validity of agreements said to be opposed to public policy may well hold that although every agreement stipulating for future payment contingent upon success ought not to be deemed contrary to public policy, yet it would be impolitic to recognise as valid, agreements of this kind, when it seems undesirable to permit the particular event to be the subject of a stipulation which gives the pleader a pecuniary interest in bringing that event to pass.

Thus a Court might hold quite consistently with the chief rule (that such agreements are not necessarily void) that it was inexpedient to give its countenance to an agreement to pay a fee contingently upon the conviction of an accused person or on his being sentenced to imprisonment instead of fine, or on his being sentenced to death instead of transportation. The reason here would be, I apprehend, not that the danger of the pleader yielding to temptation and improperly conducting his case is greater than in a civil cause, but because it is highly inexpedient that the individual unwittingly concerned should be placed in danger of suffering very serious and perhaps irreparable injury, if peradventure the pleader should yield to the temptation.

These observations I have made because there are reported decisions of this Court connected with the point, the authority of which as it seems to me is unaffected by the rule which I think should be laid down in the present case.

A brief reference to the authorities on the subject of agreements between pleader and client relating to remuneration of the former (which by the way are singularly few in number) will I think show that the rule and its qualifications above proposed, are not in conflict with the general current of decisions.

In a case reported in 2 S. W. R. p. 307, *Ranee Usmut Kower v. Mr. W. Taylor*, a case very hotly contested on both sides, Mr. Taylor, who acted as the Ranee's pleader and mukhtar, was permitted to recover by suit in addition to his retainer as mukhtar a fee of Rs. 6,000, which was clearly stipulated to be payable as an additional fee only in the event of success. It is a significant fact that though the demands of Mr. Taylor upon the Ranee were most energetically resisted, it was not even suggested that the agreement was invalid. Out of Rs. 17,000 claimed Rs. 6,000 was decreed by the High Court in respect of a single legal proceeding successfully conducted by Mr. Taylor, and two sums of Rs. 6,000 and Rs. 5,000 were disallowed merely on the ground that it was not proved that the proceedings in respect of which they were claimed had been conducted to a successful termination.

In a case at 1 N. W. P. All. part 1, p. 1, the Court carefully abstained from laying down the rigid rule that a contract between pleader and client providing for a large remuneration, including a portion of the property in suit (necessarily therefore contingent on success) was illegal and void, but held that all the circumstances of the case might be looked to to see if the claim was equitable and such as might fairly be enforced.

In the case at p. 25 of 3 N. W. P. Reports (1871) it was held that a suit is not maintainable on a *rooku* for *shukrana* given after the terms of a pleader's remuneration have been agreed upon, and when his services are already engaged. The Court said:—"The plaintiff's services were already due to the Ranee when she gave him the *rookha* for Rs. 2,500. The promise thereby made is supported by no consideration, and it imports of itself only an intention to present to the plaintiff as an offering of thanks the sum mentioned."

This case was mentioned with approval by this Court in case No. 8 of *Punjab Record* 1873, a case which in some respects resembles that last quoted, but which was decided on the express ground that the pleader had failed to prove that he had rendered the services in respect of which the remuneration was promised.

In case No. 19 of *Punjab Record* 1873, a Small Cause Court reference, the question referred was:—"Is an agreement between pleader and client conditioning to pay a certain amount on the issue of a trial or even in the event of parties filing a *razina-mah*, a legal agreement?" The pleader, who was plaintiff, received a fee of Rs. 6 from the defendant in a civil case, and an agreement that he defendant would pay the pleader a further sum of Rs. 6 on a decree being passed in the defendant's favor or if the suit was compromised. After perusing the bond, the Judges were of opinion there was nothing in it that could be called absolutely illegal.

In case No. 26 *Punjab Record* 1874, the case 8 *Punjab Record*, 1873 was mentioned, and it was pointed out that the ques-

tion of the legality of the agreement was not directly decided, while it was admitted that the opinion expressed upon this point was in conflict with the argument adopted in the judgment in No. 26 of 1874. The decision in the first of the three cases dealt with in this judgment has already been considered at length. The second case there dealt with was one in which the defendant had agreed to pay the plaintiff, Mr. Beechy, a fee of Rs. 40 on the acquittal of one Mira. In the third case a like sum was to be paid if a conviction should be upheld upon appeal to the Sessions Judge. The majority of the Court held these not to be agreements between pleader and client at all, and not to be authorized or permitted by Section 39 of Act XX of 1865. This was a sufficient ground in the view then taken of that section for dismissing these claims. It is to be observed however that the dissenting Judge, Mr. Justice Lindsay, also disallowed the claims on the 2nd and 3rd agreements, though his grounds for so doing were not stated.

It is futher to be observed that Mr. Justice Lindsay's view was that "the enforcement of contingent contracts of the kind, "to which the agreement in the first case belonged, was not "illegal or opposed to public policy." He pointed out at the same time that there are many grounds upon which such agreements may be held to be invalid, independently of their being contingent contracts.

On the whole then, the authorities, with the single exception of the case No. 26 of *Punjab Record* 1874, tend to support the rule above proposed, taken with its qualifications. That case, as I have endeavoured to show, was founded upon what seems to be a clear misapprehension of the object of Section 39 of Act XX of 1865, and even in that case the judgment of the dissenting Judge is in accordance with the views I have above endeavoured to express.

Having expressed my views fully as to the general principles to be observed in dealing with a case of the class to which the particular case now before the Court belongs, it is time to consider the particular question referred.

The question was referred with special reference to the ruling of this Court in No. 26 *Punjab Record* 1874, but I think it requires to be answered without reference to that decision, which for the reasons already given need not I think be treated as a binding and and conclusive authority.

I would answer the question referred by applying to it the rule I have already suggested as being in my opinion appropriate to cases of the class to which the agreement in the case under notice seems to belong.

The first thing is to ascertain the meaning of the agreement between the parties. The agreement was a verbal one. Its substance is stated by the Judge to be that the defendant should pay the plaintiff Rs. 100 down and Rs. 150 more in the event of success, that is, as I understand, of the stolen property being restored to the complainant. By what means this was to be effected does not ap-

pear, that is to say, whether the additional sum of Rs. 150 was to be paid upon the recovery of the jewels by the complainant, whether such recovery was due in whole or in part to exertions of the plaintiff in or out of Court, or of the police, or of any one else. Assuming that the recovery was to be due to the plaintiff's exertions, the agreement is not in my opinion void as opposed to public policy. The recovery of the money did not involve either an acquittal or conviction of the accused person, and there is reason to believe upon the evidence that the complainant's chief if not his sole object was to recover his property and not to prosecute to conviction the accused person, who was his own wife. The promise to pay the pleader is I think under the circumstances no more opposed to public policy than if the promise had been to pay a like sum to the police or to a stranger on condition of the property being recovered by their exertions.

If the additional sum was to be paid to Mr. Beechy upon the recovery of the money, whether effected by his exertions or not, still the agreement is not in my opinion void as against public policy merely because the payment was to be made on a contingency; and whether or not it was to be made out of the recovered property is I think immaterial. But the question suggests itself whether the payment was to be a portion of Mr. Beechy's remuneration or a mere voluntary gratification. This is a point which being a question of fact we are not at liberty upon this reference to decide.

I think the answer to the question referred should be that upon the facts found by the Judge the agreement as stated cannot be pronounced by this Court to be invalid and unenforceable, but that the Judge must himself decide upon inferences of fact to be drawn by himself from the evidence upon the record as it stands, or after such further enquiry as he may deem requisite, whether or not the plaintiff is entitled to recover the amount claimed, and that he should be guided in his decision by the observations above recorded.

LINDSAY, J.—In the case of *Beechy v. Gholam Ghous*, No. 22nd Jany. 1873-26 *Punjab Record*, 1874, I recorded my opinion that it was not illegal for a pleader to agree with his client that the payment of his fee, or a portion of it, should depend upon the case terminating in favor of his client; in other words, to make a contingent contract with him.

I have nothing farther to add. I agree to the answer to be sent to the Court that referred the question for our opinion.

SMYTH, J.—I concur in the answer which Mr. Justice Plowden proposes to make to the question put in this case by the Judge of the Jalandhar Small Cause Court. I also concur generally in the grounds upon which the answer is based. I think it is clear that the question raised is in no way governed by the particular provisions of Section 39 of the Pleadings' Act (XX of 1865), the object of which was simply to remove restrictions which had been placed by previous enactments on agreements between pleaders and clients in respect to the remuneration to be paid to the form-

er for their professional services, and on the mode in which such agreements were to be enforced. I do not think that an agreement between a pleader and his client whereby the remuneration of the former is made contingent on his success in a judicial proceeding is *per se* opposed to public policy, though I can readily conceive that when the agreement is of that class there may be superadded circumstances which would often in particular cases make it void as being opposed to public policy. It does not seem to me possible to lay down any useful general rule as to the class of circumstances which would have this effect.

The question must be decided in each case on its own peculiar circumstances. But subject to the qualifications and safeguards which Mr. Justice Plowden has been careful to specify I am prepared to concur with him in the general rule, as far as it goes, which he proposes to lay down in regard to agreements between pleaders and their clients for the remuneration of the former for their professional services. Such agreements should be scrutinized by the Courts with peculiar care, and disallowed without hesitation whenever they appear to be unconscionable or inequitable or opposed to public policy.

No. 6.

APPELLATE SIDE.

{ KHARAK SING & ANOTHER,—(Defdts.),—APPELLANTS,

Versus

{ PANJAB SING,—(Plaintiff),—RESPONDENT.

Case No. 862 of 1877.

(PLOWDEN AND SMYTH, JJ.)

Civil Procedure Code, Act X of 1877, Section 629—Review—Second application for.—A second application for review is in effect an application to review an order passed on an application for review, and cannot therefore, under the last clause of Section 629, Act X of 1877, be entertained.

On the 11th June 1877 defendants appealed to the Chief Court against the order of the Judicial Assistant, Ferozpur, dated 30th April 1877. The appeal was rejected at a preliminary hearing, by Mr. Justice Smyth, on the 18th June 1877.

On 21st July 1877 defendants applied for review of judgment, and their application was rejected by Mr. Justice Smyth, on 31st July 1877.

On 25th October 1877 defendants again applied for review. The Deputy Registrar submitted the application with a note that it could not be entertained with reference to Section 629 of the new Civil Procedure Code (Act X of 1877).

The question was referred to the Bench in the following order by

SMYTH, J.—Section 3 of the new Code may perhaps be taken to save the old procedure in regard to suits and appeals instituted before 1st October 1877. As the question raised in this case is a somewhat novel one, I think this application may go before a Bench, though as far as I can see at present the decision of the Judicial Assistant is I think correct.

The case came on for hearing before Plowden and Smyth, JJ., who delivered the following

Judgment.—This application is in effect an application to review an order passed on an application for review, and under the last clause of Section 629, Act X of 1877, it cannot be entertained. That Section applies in the present case, Section 3 of the new Act saving only the procedure *prior to decree* in suits or appeals instituted before the new Act came into force. It does not save the old procedure in regard to applications for review of judgment or any other procedure subsequent to the decree.

This application must therefore be rejected.

No. 7.

THE DEHLI & LONDON BANK, LIMITED,—(Plf.)—APPT. }

Versus

MAJOR M. A. D. ORCHARD,—(Defendant),—RESPONDENT. }

PRIVY COUNCIL.

Present :

SIR JAMES W. COLVILLE.

SIR BARNES PEACOCK.

SIR MONTAGUE E. SMITH.

SIR ROBERT P. COLLIER.

Lords of the Judicial Committee of Her Majesty's Privy Council.

Limitation—Act XIV of 1859, Sections 20 and 21—Execution of decree for money—Res-judicata—Act VIII of 1859, Section 2.—A decree for money against the respondent having been obtained by the appellant on the 5th October 1866, the former made payments on account up to October 1869, on the 22nd of which month the appellant made a *bond fide* application to execute the same in respect of the unpaid balance. An order to that effect was refused by the Court which made the decree, but the respondent nevertheless made further payments on account.

On the 4th May 1871, a fresh application for execution was made, which was eventually again refused, the Chief Court of the Punjab holding that the decree having been obtained before the introduction of Act XIV of 1859 into the Punjab the case must be governed by the provisions of Section 21 and not by Section 20 of that Act.

Held, by the Privy Council, that the application of 22nd October 1869, was a proceeding to enforce the decree within the meaning of Section 20, and having been taken within three years next preceding the application of 4th May 1871, this last application was not barred by Section 21.

The prohibition laid down in Section 20 does not on the true construction of Section 21 apply to judgments in force at the time of passing the Act.

Held further, that an order refusing an application to execute a decree is not an adjudication within the rule of *res-judicata* or within Section 2 of Act VIII of 1859.

Appeal by special leave of Her Majesty in Council from the order of the Chief Court of the Punjab, dated 31st July 1874.

14th May 1877.

Judgment.—This is an appeal from a judgment and order of the Chief Court in the Punjab, dated the 31st July, 1874, reversing on review a former judgment and order of the same Court of the 17th March, 1873, and thereby disallowing the execution of a decree obtained by the appellants against the respondent for the recovery of a sum of Rs. 14,408: 14 for debt and costs.

The judgment was recovered on the 5th of October, 1866, in the Court of the Deputy Commissioner of Delhi. Subsequently to the decree the defendant made various payments on account up to the month of October 1869. On the 22nd of that month the plaintiffs presented a petition to the Deputy Commissioner, claiming a balance of rupees 19,227: 3 for principal and interest, and praying that, after ascertaining the amount to be recovered, a certificate might be sent to the Civil Court at Meerut, transferring the decree, in order that it might be executed in that Court.

It is unnecessary to refer particularly to all the proceedings which took place on that petition; it is sufficient to say that on the 10th of December, 1869, the Deputy Commissioner made the following order:—

“The decree is of a prior date to the introduction of Act 14 of 1859. It should be executed according to the civil law of the Punjab; and as, according to the said law the period of one year was fixed for its execution, and in case that period expires, the rule is that the decree should be executed by obtaining the sanction of the Commissioner; and as on the report sent for obtaining sanction the Commissioner did not pass any order either giving sanction or any other order, and as it is not within the power of this Court to execute such a decree, it is ordered that (the petition) be sent to the record-room.”

There can be no doubt that the application made on the 22nd October, 1869, was *bona fide*, and, indeed, the learned counsel for the respondent has very properly admitted that it was so.

No appeal was preferred from the order of the 10th December, 1869; but the defendant, notwithstanding the order, made further payments on account.

On the 4th May, 1871, the plaintiff, alleging that the payments made were not sufficient to cover the interest, and claiming a balance of rupees 23,772: 13: 7, made a fresh application to the Deputy Commissioner for a certificate and transfer of the decree to the Court of Meerut for execution, and prayed that a summons might be issued under the provisions of Act 8 of 1859.

Upon that petition the Deputy Commissioner, on the 6th May, 1871, made the following order:—

“As the application for execution has already been rejected and sent to the record-room, and now the period for execution has expired totally, it is ordered that the application be rejected and sent to the record-room.”

With reference to the statement that the period for execution had then totally expired, it may be as well to point out that Act 14 of 1859 was extended to the Punjab on the 1st January, 1867, and consequently that the period of three years from the time when the Act came into operation in the Punjab had expired before the application of the 4th May 1871 was made. On the 30th June, 1871, the Deputy Commissioner refused to review his judgment, and on the 10th July of that year the plaintiffs appealed to the Commissioner, who, on the 18th August, 1871, dismissed the appeal, holding, amongst other things, that the three years' grace under the limitation law expired on the 1st January, 1870, and that a mere petition for execution which was dismissed was not sufficient to keep a decree in force.

The case was appealed to the Chief Court of the Punjab, which at first rejected the appeal. Subsequently a full Bench of that Court, on the 17th of March, 1873, upon review, decreed the appeal with costs, and reversing the orders of the lower Courts, ordered and decreed the appellant's application for execution with costs and the costs of the appellant in the Appellate Court. They said :—

"The application for execution in 1869 to the Assistant Commissioner at Delhi was, in the opinion of this Court, a *bonâ fide* proceeding to enforce the decree of 1866. It was a proceeding to enforce the decree, and not merely to keep the decree in force. Before the expiration of three years from the date of that proceeding the present application was filed."

Subsequently, on the 31st July, 1874, upon a review of the judgment so given on review, the Chief Court reversed their decree of the 17th March, 1873, upon the ground that the decree having been obtained before the introduction of Act 14 of 1859 into the Punjab, the case must be governed by the provisions of section 21, and not by section 20. The case was decided by Mr. Justice Boulnois and Mr. Justice Melvill upon the authority of the cases of *Bairudekuvar v. Mulji Naran* (3 Bombay High Court Appeal Cases, 177), and *Makanda Valad Balacharya v. Sita-râm and Nilo* (5 Bombay High Court Appeal Cases, 102). Mr. Justice Thornton held a contrary opinion, and recorded his reasons for dissent.

It was not contended that the decision of the Chief Court of the 17th March, 1873, was incorrect for any other reason than that afforded by the words of the 21st section of the Act.

The case depends upon the proper construction to be put on Sections 20 and 21 of Act 14 of 1859. The following are the words of those two sections :—

"XX. No process of execution shall issue from any Court not established by Royal Charter to enforce any judgment, decree, or order of such Court, unless some proceeding shall have been taken to enforce such judgment, decree, or order, or to keep the same in force, within three years next preceding the application for such execution.

"XXI. Nothing in the preceding section shall apply to any judgment, decree, or order in force at the time of the passing of this Act, but process of execution may be issued either within the time now limited by law for issuing process of execution thereon, or within three years next after the passing of this Act, whichever shall first expire."

It was pointed out, in the case of *Kishen Gooroo Doss Auckhulu and others v. Moodhoo Koondoo and others* (6 Weekly Reporter, Miscellaneous Full Bench Rulings, p. 98), that according to the

literal wording of Section 20 no process of execution could ever issue to enforce a judgment, even within a week from the date of it, unless some proceeding had been taken to enforce or keep it in force within three years next before the application for execution; and it was held that such a construction was obviously insensible, and that the meaning of the section was that no process of execution should be issued to enforce a judgment or order of a Court not established by Royal Charter, after the expiration of three years from the date of it, unless some proceeding to enforce it, or to keep it in force, should have been taken within three years next before the application for such execution.

That was held to be the proper construction of Section 20, both in that case and in the subsequent Full Bench case of *Gangaluchun Ghosal v. Bonomalu Mullick and others* (7 Weekly Reporter, Full Bench Rulings, p. 515).

In the latter case it was held that, under the 21st section, execution might issue after the expiration of three years from the time of the passing of the Act to enforce a judgment which was in force at the time when the Act was passed, provided some proceeding to enforce a judgment within the meaning of Section 20 had been taken within three years next preceding the application for execution.

That decision was followed by the High Court in Madras, in the case of *Karuppanan v. Muthannan* (5 Madras High Court Reports, p. 105).

The High Court in Bombay put a different construction upon Section 21. The cases are referred to in the judgment now under appeal. They held that the words, "Nothing in the preceding section shall apply to judgments in force at the time of the passing of this Act," could not be rejected without violating a fundamental rule for the construction of statutes; and that the words "may be issued," should be read as "must be issued;" and they treated the words "judgment in force at the time of the passing of this Act," as applicable to a judgment in force at the time of the extension of the Act to the Punjab, though not in force at the time of the passing of Act 14 of 1859.

It cannot be disputed that the construction put upon the Act by the High Court at Calcutta, if permissible, was equitable, and prevented what must be admitted to be an inconvenience and injustice (p. 43). Indeed, if the construction put upon the Act by the High Court at Bombay, and by the Chief Court in the Punjab, is correct, a judgment-creditor could not, after the three years, have enforced a judgment which was in force in the Regulation Provinces when Act 14 of 1859 was passed, or a judgment which was in force in the Punjab at the time when the Act was extended to that province, however diligent he might have been in endeavouring to enforce his judgment, and however unable, with the use of the utmost diligence, to get at the property of his debtor. Such a construction would cause great inconvenience and injustice, and give the Act an operation which would retrospectively deprive the creditor of a right which he had under the law as it existed in the Regulation Provinces at the time of the pass-

ing of the Act, and in the Punjab at the time of the introduction of it. Their Lordships are of opinion that such a construction would be contrary to the intention of the Legislature.

There is no doubt that in some cases the word "must," or the word "shall," may be substituted for the word "may;" but that can be done only for the purpose of giving effect to the intention of the legislature; but, in the absence of proof of such intention, the word "may" must be taken to be used in its natural, and therefore in a permissive and not in an obligatory sense.

On the construction of this inartificially drawn statute their Lordships are of opinion that the words, "Nothing in the preceding section shall apply to a judgment in force at the time of the passing of the Act," mean that nothing in the preceding section should prejudicially affect the right of a creditor under a judgment in force at the time of the passing of the Act; and that the words "but process of execution *may* be issued," mean that, notwithstanding anything mentioned in the preceding section, execution might issue either within the time limited by law, or within three years next after the passing of the Act, whichever should first happen.

It appears, then, to their Lordships that the words, "Nothing in the preceding section" (as used in Section 21), mean that the prohibition laid down in Section 20 should not apply to judgments in force at the time of the passing of the Act.

Without expressing their concurrence in all the reasoning of the Full Bench in the Calcutta case above cited, their Lordships are of opinion that that decision was correct, and that the application made to the Court of the Deputy Commissioner of Delhi, on the 22nd of October, 1869, being *bond file*, though unsuccessful, was a proceeding to enforce the judgment within the meaning of Section 20; and that that proceeding having been taken within three years next preceding the application made on the 4th May, 1871, to which the judgment now under appeal relates, such last-mentioned application was not barred by the 21st Section of Act 14 of 1859, and ought to have been granted.

It was contended that the rule *res judicata* applied, and that the application made on the 4th of May, 1871, was barred by the order of the Deputy Commissioner, of the 10th day of December, 1869, from which no appeal was preferred. But their Lordships are of opinion that the order of the 10th day of December, 1869, was not an adjudication within the rule of *res judicata*, or within Section 2 of Act 8 of 1859.

For the above reasons their Lordships will humbly advise Her Majesty that the judgment and order of the Chief Court of the Punjab, of the 31st of July, 1874, be reversed, and that the judgment and order of the 17th March, 1873, be affirmed and stand in force; and that the defendant do pay to the plaintiffs their costs incurred in the Chief Court of the Punjab subsequently to that decree. The respondent must pay the costs of this appeal.

No. 8.

APPELLATE SIDE. { KUTBA,—(Defendant),—APPELLANT,
Versus
SHANKAR DASS,—(Plaintiff),—RESPONDENT.

Case No. 459 of 1877.

(FITZPATRICK AND FLOWDEN, JJ.)

Receipt of consideration—Admission before Registering officer.—The admission before the Registering officer of the receipt of consideration is evidence, but not necessarily conclusive evidence of the payment of the consideration stated to have been paid.

Special appeal from order of Judicial Assistant of Sialkot, dated 1st February 1877.

The judgment of the Chief Court was delivered by

6th Novr. 1877.

FITZPATRICK, J.—The plaintiff sues for possession under a registered deed of mortgage admitted by the defendant to have been executed by him. The defendant pleads that the transaction was purely fictitious, entered into with a view to save the property from being seized by his other creditors, and that no consideration passed. The first Court held this plea to be false. The Appellate Court, as we understand its judgment, held that the defendant having admitted receipt of full consideration before the Registering officer could not now set up a plea to the contrary, and dismissed the appeal.

This decision is clearly wrong: the admission before the Registering officer is evidence, but not necessarily conclusive evidence of payment of the consideration stated to have been paid.

We do not think it necessary to decide at this stage of the case whether assuming the defence set up to be true in fact, it is no answer to the action.

We think the Lower Appellate Court should come to a conclusion upon the facts, as to whether the transaction was a genuine one or not, thus disposing of the case upon its merits.

We accordingly, accepting this appeal, return the case to the Lower Appellate Court for re-decision with reference to the above remarks. Costs of this appeal to follow the event.

No. 9.

JODH SING,—(Plaintiff),—APPELLANT,

Versus

WASSAWA SING,—(Defendant),—RESPONDENT.

} REFERENCE SIDE,

Case No. 10 of 1877.

(FITZPATRICK AND PLOWDEN, JJ.)

Act VIII of 1859, Section 17—Punjab Government Notification No. 1225 dated 26th September 1866.—Recognised Agent—Plaint filed by, without power of attorney—Acceptance of plaint by Court—Limitation.—On 30th January 1877, (before the period of limitation had expired) plaintiff instituted his suit in the proper Court at Attari. The plaint was presented (without a power of attorney) by plaintiff's daughter-in-law, R., who stated that plaintiff came with her and became extremely ill, that he was lying outside the village, and that as the period of limitation was expiring he had sent her on to file it.

On the same date the Court directed the plaint to be kept in the office, and R. to bring the plaintiff in person or else a mukhtarnama from him.

On 19th February 1877 (after the period of limitation had expired) plaintiff was taken to Court in a doolie and attested a mukhtarnama by which he appointed his nephew J. S. his mukhtar for the purpose of conducting the suit.

Held that a written authority to present the plaint was not necessary in favor of R. acting as recognized agent of the plaintiff under the proviso to Section 17 Act VIII of 1859, added by Punjab Government Notification No. 1225 dated 26th September 1866, and the Court having in fact accepted and retained the plaint it was filed within time.

Case referred by Additional Commissioner, Amritsar, under Section 28, Act XXIII of 1861.

Stated case.—On the 22nd Magh 1930 (corresponding to 2nd February 1874) Wassawa Sing executed a promissory note (*tombu*) in favor of Jodh Sing for Rs. 40, payable with interest at one per cent per mensem. No time was fixed for payment.

On the 30th January 1877 (before the period of limitation had expired) a suit was brought to recover Rs. 76 (including Rs. 36 as interest) upon the note in the proper Court (Sirdar Ajit Sing's). The plaint was in the name of the payee Jodh Sing, but it was presented not by himself in person but by his daughter-in-law Roopan, and she had no power of attorney. The Court asked her why she filed the plaint seeing that it was in the name of Jodh Sing. She replied that she was Jodh Sing's daughter-in-law, that he came with her but became extremely ill, that he was lying outside the village, and that as the period of limitation was expiring he sent her on to file the plaint.

Thereupon, on the 30th January 1877, the Court recorded an order that the plaint was to be kept in the office, and Mussummat Rupan was directed to bring Jodh Sing in person or else a mukhtarnama from him.

On the 19th February 1877 Jodh Singh was taken to Court in a doolie, and attested a mukhtarnamah by which he appointed his nephew Jowala Singh his mukhtar for the purpose of conducting the suit.

Thereupon a summons was issued to the defendant Wassawa Sing to appear on the 2nd March. He appeared on that date, took no exception on the ground of limitation, but pleaded payment of the note.

On the 2nd March the Court having doubts as to whether the suit could be considered as instituted within the period of limitation, referred the matter to the Deputy Commissioner for opinion.

The Deputy Commissioner declined to give an opinion upon the point, and on the 19th March the Court dismissed the suit as barred by limitation, holding that it could not be considered as instituted till the 19th February 1877.

Jodh Singh now appeals to this Court, and urges that under Section 4 Act IX of 1871 his suit should be considered to have been instituted within the prescribed period.

I am not free from doubt in this case. Under the explanation given under Section 4 Act IX of 1871 a suit is held to be instituted in ordinary cases when the plaint is presented to the proper officer. But I consider that this must be read with Section 25 Act VIII of 1859, which enacts that the plaint shall be presented to the Court by the plaintiff in person or by his recognised agent or by a duly appointed pleader.

In the present case the plaint was presented to the proper Court, but it was presented by the plaintiff's daughter-in-law. The question seems to me to resolve itself into whether Mussummat Roopan can be held to have been the recognised agent of Jodh Sing.

Recognised agents are defined in Section 17 Act VIII, but that Section is subject to a proviso in the Punjab under which the Court has a discretion to permit applications and appearances to be made by persons (other than pleaders or mukhtars), "specially authorized by parties to appear and act on their behalf in any particular suit."

Can Mussummat Roopan be held to have been specially authorized by Jodh Sing to present the plaint to the Court under the circumstances above stated?

I find as a fact that she was verbally authorized by Jodh Sing to proceed to the Court and present the plaint. She had not a power of attorney or other authority in writing.

But I do not find that it is strictly necessary that a person specially authorized under the above proviso should be authorized by written instrument. Section 18 of the Code expressly requires a pleader to be appointed by written instrument. So also under Section 19 the authority from a soldier or officer to conduct a suit must be in writing. But the authority of recognised agents need not in all cases be in writing and I can find no express

provision requiring the authority of persons appointed under the proviso before quoted to be in writing. No doubt the Court would exercise its discretion wisely if it required a person claiming to act under the proviso to bring a written authority, just as Sirdar Ajit Singh did in the present case.

But in the absence of such a written authority I consider that it would be competent to the Court to receive a plaint from a person alleging that he had been verbally specially authorized by the plaintiff to present it, and that under such circumstances as were alleged in this case a Court would not exercise its discretion wisely if it refused to receive the plaint provisionally, that is, pending the production of an authority in writing or pending enquiry as to whether the agent had really been specially authorized by the party.

I have only to note further that the proviso before quoted leaves it to the discretion of the Court to permit applications to be made by persons specially authorized.

In the present case the Court did not expressly permit the plaint to be filed by Mussamat Roopan, but it went so far as to receive the plaint, and it directed her to bring the plaintiff in person or a mukhtarname. I consider that that is tantamount to a provisional acceptance of the plaint, but whether it is so or not I consider that as the Court had a discretion in the matter it was bound under the circumstances stated to admit the plaint pending enquiry as to Mussamat Roopan's authority. Under the view which I take I consider that the plaint should be held to have been instituted within the prescribed period; but as the point is not free from doubt I submit it for the decision of the Chief Court under Section 28 Act XXIII of 1861. The question is whether under the circumstances stated the suit was or was not instituted within three years from the 2nd February 1874, the date of the promissory note. Pending the Chief Court's decision the appeal will be retained on the files of this Court.

The following judgments were delivered :—

FITZPATRICK, J.—I agree with the Additional Commissioner in thinking that a person may be permitted to appear for another under the proviso referred to on its being found that he is verbally authorized by such other to appear for him. There is nothing that I can see to require the authority to be in writing. *12th June 1877.*

Further, I think that the permission may be granted for one particular appearance or application, and it seems to me that the Sirdar's order of the 30th January 1877 in the present case is to be construed as an order permitting Mussamat Roopan to appear for Jodh Sing on the particular occasion, and for the limited purpose of presenting the plaint, but intimating that for any further proceedings in the suit a written authorization from Jodh Sing would be required. So construed, it seems to me to have been under the circumstances a very proper order to pass.

I would accordingly answer that the suit is to be considered as instituted within the period of limitation.

In giving this opinion I have assumed that the Additional Commissioner is right in holding that the period of limitation expired on the 2nd February 1877.

LOWDEN, J.—I concur in holding that a written authority to present the plaint was not essential; as the plaint was in fact accepted and retained by the Court. I should also, if it were necessary, be disposed to hold that the act of the Court in receiving the plaint could not operate to the plaintiff's prejudice.

Had the plaint been returned it might again have been presented in time. I observe that the mukhtarname filed afterwards is dated January 30th, and its execution on that date was not physically impossible.

No. 10.

APPELLATE SIDE. {	NUR ALI,—(Defendant),—APPELLANT,
	<i>Versus</i>
	RAM GOPAL AND SHEO DYAL,—(Pffs.),—RESPONDENTS.

Case No. 90 of 1877.

(FITZPATRICK AND LOWDEN, JJ.)

Public thoroughfare—Street—Nuisance—Suit to close a drain.—Plaintiff sued to compel defendant to close a drain through which the water from his mosque flowed on to the public street in front of plaintiffs' premises. *Held* that the suit was not maintainable without proof of special damage, differing not merely in degree but in *kind* from that sustained by the rest of the public.

Special appeal from order of Additional Commissioner, Delhi Division, dated 23rd October 1876.

Kali Prosono Roy for Appellant.

Kirkpatrick for Respondents.

The judgment of the Chief Court was delivered by

29th Augt. 1877.

FITZPATRICK, J.—This suit was brought to compel the defendant to close a drain through which the water from his mosque flowed on to the street in front of the plaintiffs' premises, and the Additional Commissioner has given the plaintiffs a decree.

It has been contended before us on behalf of the plaintiffs that the street in question is private property, but as this was never distinctly alleged until the case was before the Additional Commissioner in second appeal, and as the proceedings have been conducted throughout on the assumption that the street is a public thoroughfare, we think it must for the purposes of this suit be treated as such a thoroughfare.

Baboo Kali Prosono Roy, who appears for the appellant, contends that the plaintiffs have no ground of action inasmuch as

there is no proof that the water causes them any *special* damage over and above what it causes to the rest of the public. We think this contention is well founded. The Additional Commissioner no doubt expressly finds that "special inconvenience is "caused to the plaintiff [one of the plaintiffs] as it [the water] "reaches his new door," but on looking to the evidence taken for the plaintiffs when the case was remanded, on which evidence this finding appears to be based, it is clear that the Additional Commissioner must be understood to find no more than this, that the water flows or lies on the soil of the street up to the plaintiffs' door. But it by no means follows from this that the plaintiff suffers "special damage" in the sense in which special damage is held to be necessary to sustain an action of this sort. In one sense no doubt he may be said to suffer special damage, *viz.*, that whereas other persons are comparatively rarely inconvenienced by the water as they have not often occasion to pass over the particular portion of the thoroughfare on which it is lying, the plaintiffs are inconvenienced by it every time they enter or leave their house, but this more extensive damage suffered by the plaintiffs though in a certain sense it may be termed "special damage" is not the sort of "special damage" required to sustain an action of this kind.

The special damage required to sustain an action of this sort must be damage differing not merely in degree but in kind from that sustained by the rest of the public, and the reason of this rule is obvious. If we were to hold that the plaintiff in this case might maintain a suit by reason of the water coming up to his door, and of his having to pass through it every time he entered or left his house, the same rule would apply if the water instead of lying at his very door lay at any distance off across the entrance to *cul de sac* in which he lives, and if that *cul de sac* were twenty times as large as it is and contained hundreds of inhabitants every one of those inhabitants might maintain a separate action, a result which it is the very object of the rule which prohibits an action of this sort without proof of special damage, to avoid.

On these grounds we should, if we were to dispose of the case on the record as it stands, feel compelled to reverse the Additional Commissioner's decision and dismiss the plaintiffs' suit, but at it is found that the water came up to the plaintiffs' house it strikes us as possible that the plaintiffs may be in a position to prove special damage of the nature requisite to sustain their action,—damage we mean differing in *kind* and not merely in *degree* from that suffered by the rest of the public; he may *e. g.*, be in a position to shew that the water by lying against the wall of his house causes it some structural damage, or that the water by stagnating before his door makes his house unhealthy or unpleasant to live in, and as we think it is only fair that he should be allowed an opportunity of proving this, if he can, we remand the case to the Commissioner for a fresh decision with reference to the above remarks. There will be no order as to costs.

No. 11.

DIALU MAL,
GAINDA MAL,
MANNI RAM,
MUSHTAK,

} DECREE-HOLDERS,

Versus

MR. C. BRYAN, JUDGMENT-DEBTOR.

(LINDSAY AND FITZPATRICK, JJ.)

Case No. 14 of 1877.

} REFERENCE SIDE.

Succession Act (X of) 1865, Section 282—Distribution of assets—Priority—Mortgage lien—Interest on claim secured by decree.—In July 1876 B. took out letters of administration of the estate of O'C. deceased. The largest creditor was B. himself, who held a lien on a life policy, which represented almost the entire assets of the deceased. B.'s claim was however under a decree which carried no interest. The remaining creditors contended that B. was only entitled to his *pro rata* share under Section 282 Act X of 1865, and also that he was entitled to no interest on his claim.

Held that, the only claims to priority intended to be excluded by Section 282 were claims on the ground that the debt is a specialty debt and on other grounds *ejusdem generis*, and therefore, that B. was entitled to be first paid.

Held further, that B.'s claim being based upon a decree which did not provide for the payment of interest, he was not entitled to interest on it.

Case referred by Officiating Judges of Small Cause Court Lahore and Amritsar, under Act X of 1865.

Kali Prosono Roy for Decree-holders.

Sinclair for judgment-debtor.

“ Stated case.—It appears that in July 1876 Mr. Bryan took out letters of administration of the estate of Mr. J. H. O'Callaghan, deceased.

On 31st July 1876 he issued an advertisement calling upon creditors to send in their claims by the 15th November 1876. Not one of the present decree-holders sent in their claims by that date, nor was a distribution of assets then made. In March 1877 Dialu Mal appears to have put in a claim, but refused to take a *pro-rata* share. He held a decree and also had a separate claim against the estate of the deceased.

Of Dialu Mal's separate claim Mr. Bryan again got notice through this Court, by summons on 5th July 1877, when a regular suit had been instituted against him as representative.

Of the claims of Gaiinda Mal and Manni Ram he had similar notice, on the 16th July 1877, and of the claim of Mushtak he had notice on the 21st July 1877.

It is probable the parties went to Mr. Bryan shortly before taking legal proceedings against him, but whether they did so or

not is not material, as up to the 21st July 1877, when Mr. Bryan received notice of the last claim, there had been no distribution of the assets amongst the creditors.

On the 24th July Mr. Bryan paid Messrs. Jamsetjee and Son's Karim Buksh, and Mr. Ball, creditors of the estate, in full.

He still had a small surplus of Rs. 43, or thereabouts, which was paid into this Court in execution of other decrees on the 26th July 1877.

In the case of the present creditors Mr. Bryan did not appear on the dates fixed for final hearing, and the claims were decreed against him ex-parte. In execution he made a return to the prohibitory orders issued that he had no assets, whereupon the decree-holders applied to execute the decrees against him personally under the provisions of Section 203 Act VIII of 1859. Upon notice Mr. Bryan appeared and filed a statement showing his administration of the estate.

On behalf of the decree-holders it has been objected that Mr. Bryan was not justified in clearing off his own debt in full with reference to the provisions of Section 282 of the Indian Succession Act 1865; second, in charging interest on such debt; and third, that he was not justified in paying certain creditors in full on 24th July 1877 when he had notice of the claims of the present decree-holders.

It is not disputed that Mr. Bryan had a lien on the policy, which represented almost the entire assets of the deceased; but it is contended that Mr. Bryan has lost his lien by reason of Section 282 of the Indian Succession Act 1855, which enacts that "Save as aforesaid" (that is, as provided in Sections 289 and 280 and 281) "no creditor is to have a right of priority over another, by reason that his debt is secured by an instrument under seal, or on any other account. But the executor or administrator shall pay all such debts as he knows off, including his own, equally and rateably, as far as the assets of the deceased will extend."

The questions we have to refer for the decision of the Chief Court are the following:—

1st.—Was Mr. Bryan entitled to be first paid by reason of his lien on the policy, or did he lose his right of priority by reason of Section 282 of the Indian Succession Act 1865?

2nd.—Was he entitled to charge interest on his debt?

3rd.—Was he justified in paying certain creditors in full on 24th July 1877, seeing that he had notice of the claims of the present decree-holders prior to that date?

On the 1st point we are of opinion that Mr. Bryan was entitled to be paid in full by reason of his lien on the policy, notwithstanding the provisions of Section 282 of the Indian Succession Act 1865. We are of opinion that Section 282 was enacted to do away with the complicated rules of priority under English law as detailed in Chapter II of *Williams on Executors*, and not to do away with mortgage or other liens. We are inclined to the opinion

that the value of the policy minus the amount of the lien represents the true value of the assets of the deceased, this being the rule followed in levying probate duty under the Court Fees Act 1870; see *Sutherland's Weekly Reporter*, page 253, Civil Rulings, and 6 *N. W. P. High Court Reports*, page 253. We are of opinion that Mr. Bryan did not lose his right of priority by reason of Section 282, which we are of opinion was not intended to apply to such a case as the present; but if it be held that Section 282 is applicable, we still think he was entitled to be paid, because the only right the deceased had in the policy was the right to redeem it on payment of the debt due to Mr. Bryan, and that, for the purposes of Section 282 the value of the deceased's equity of redemption must be considered as the assets of the deceased, and only such assets are the creditors entitled to have rateably distributed under the provisions of Section 282 of the Indian Succession Act 1865.

On the 2nd point we are of opinion that Mr. Bryan is not entitled to claim the sum of Rs. 262 interest on his debt. He obtained a decree in the lifetime of the deceased, and is only entitled to the sum decreed. The decree is silent as to interest, and though no doubt he would have been entitled to interest on his debt up to date of payment, he cannot now claim interest as the debt has merged in the decree, and it is only under that he can claim.

On the 3rd point we are of opinion that Mr. Bryan was not justified in paying certain creditors in full on 24th July 1877, without regard to the claims of the present decree-holders, of whose claims he had received notice prior to that date. No doubt if the creditors who were paid in full on 24th July 1877 had been paid on the 15th November 1876 Mr. Bryan would have been protected under the provisions of Section 42 Act XXVIII of 1866; but we are of opinion that that Section does not protect him, seeing that he had notice of the present claims prior to the 24th July 1877, when he made a distribution of the assets of the deceased. We consider that he is liable personally to the present claimants to the extent of any sums which would have been payable to them on 24th July 1877 had he then made a *pro rata* distribution as required by law.

As the points involved are important, and both parties desire it, we have passed our decision as above contingent upon the opinion of the Chief Court, and meanwhile stayed all further proceedings."

FITZPATRICK AND LINDSAY, JJ.—We agree with the Judges of the Small Cause Court in thinking that Mr. Bryan was entitled to be first paid by reason of his lien. Looking to Section 282 of the Succession Act, and to the context in which it occurs, we think it is quite clear that the only claims to priority which it was intended to exclude were claims on the ground that the debt is a specialty debt, and on other grounds *ejusdem generis*, as e. g. on the ground that the debt is a debt of record or a debt due to the Crown. A debt secured by a lien on property stands on a totally different footing, the executor or administrator taking such property subject to the charge.

1st Novr. 1877.

As regards the second point referred, we agree with the Judges of the Small Cause Court in thinking that, as Mr. Bryan's claim was based upon a decree, and that decree did not provide for the payment of interest, Mr. Bryan was not entitled to interest.

The third point has been abandoned by Mr. Sinclair before us, and it is accordingly unnecessary to consider it.

The parties will bear their own costs.

No. 12.

APPELLATE SIDE. } RATTAN SING AND OTHERS,—(Plaintiffs),—APPELLANTS,
Versus
FAJJU SHAH,—(Defendant),—RESPONDENT.

Case No. 182 of 1877.

(FITZPATRICK AND PLOWDEN, JJ.)

Tenancy Act (XXVIII of 1868) Section 5, Clause 4—Occupancy rights—Jagirdar—Mafidar.—Held that the term jaghirdar includes a mafidar in Clause 4, Section 5 Act XXVIII of 1868.

Regular appeal from order of Additional Commissioner Amritsar, dated 4th November 1876.

Gouldsbury for Appellants.

The plaintiffs, proprietors, sued to obtain possession of certain land held by defendant. The defendant, mafidar, pleaded that he was entitled to rights of occupancy.

The land in dispute, five kanals, two marlas, is part of an area of five kanals 19 marlas which was granted by the zamindars of the village to the defendant for the maintenance of a takiya in the village. The grant as a mafi grant was recommended by the Settlement officer for sanction in 1852, and was sanctioned by the Financial Commissioner in 1853 for the life of the defendant.

There was no dispute as to the defendant being mafidar, and also the takyidar.

Defendant's grand-father used to be the takiydar of the takiya, and after him defendant's father. It was then unoccupied for a time, and the zamindars located other fakirs not related to defendant. They held for some 20 years, and during that time defendant's family were out of possession. Defendant was a *pahlwan*, and about the time of annexation he exhibited his prowess before the zamindars, who rewarded him by restoring him to the possession of the takiya, and granting him the plot of land held in mafi. The grant was for the maintenance of the takiya. At settlement the defendant was takyidar and in enjoyment of the proceeds of the land (though he did not cultivate the land himself), and when the mafi was investigated the grant was upheld in his name for

life. The Court of first instance found that the defendant had not been in continuous occupation of the land, and accordingly decreed the claim.

The Additional Commissioner on appeal found that defendant had been in continuous occupation for 20 years, and being of opinion that the term *mafidar* was comprised in the term *jaghirdar*, held that defendant was entitled to rights of occupancy under Clause (4) Section 5 of the Tenancy Act 1868. The Additional Commissioner accordingly dismissed the suit.

From this order the plaintiffs appealed to the Chief Court.

Gouldsbury for appellants contended that the word "*jaghirdar*" in Section 5 Clause 4 of the Tenancy Act 1868 could not be construed as including a revenue-free holder of the class to which the respondent belonged; and further, that respondent had failed to prove 20 years continuous occupation of the land in dispute.

The judgment of the Chief Court was delivered by

FITZPATRICK, J.—(Who after stating the questions raised by Gouldsbury continued.) The Additional Commissioner decides both questions in the affirmative, that is to say, in favor of the respondent, and I agree with him. *9th Novr. 1877.*

To begin with the former question, two limitations of the meaning of the term "*jaghirdar*" have been suggested, *viz.*

(a.) That it includes only persons having a revenue-free grant of an entire village or a large division of the village.

(b.) That it includes only persons holding revenue-free on a service tenure.

As regards the first of these suggested limitations, some such limitations no doubt seems to have occurred to some of those who took part in the proceedings which led up to the passing of the Tenancy Act. Thus, Mr. Prinsep, though he proposed to concede as much (and even more) to the holders of small revenue-free plots in villages than to the holders of revenue-free grants of entire villages, appears, from p.p. 136 and 137 of the selected papers, to have distinguished the two classes—calling the former "*mafidars*" and restricting the term "*jaghirdars*" to the latter. I must say that, speaking from many years experience of this province, I do not think this distinction is warranted by general usage. But however that may be, I think it is quite clear that the clause of the Act we are now considering was designedly drawn so as to exclude every distinction of the sort. It gives the right of occupancy to every person who is "*jaghirdar of the village or any part of the village,*" and I think by "*part*" is meant not merely a large division of the village but any plot in the village however small. I feel confirmed in this view when I remember that, as pointed out by the the Additional Commissioner, these holders of small revenue-free plots have been regarded as having a stronger claim on the land than the holders of the larger assignments.

I accordingly hold that the defendant is not excluded from the benefit of the clause by reason of the smallness of his holding.

As regards the second of the two limitations suggested, *viz.*, that which would restrict the term "jaghirdar" to the holder of a *service* grant, it is to be observed that in the Bill as amended by the Murree Committee, pp. 630—631 of the selected papers, there was a paragraph added to the interpretation clause limiting the term "jaghirdar" in this way, and that, in the Bill as finally passed this clause was omitted. Now, if it could be said that the word "jaghirdar" was in common parlance well understood to be limited in this way, it might be argued that this paragraph was omitted as superfluous, but I do not think this can be said. It may be that the word "jagir" was originally applied only to a *service* grant; but it has long become the practice to use it in a wider sense, as including most if not all descriptions of revenue-free grants; thus the celebrated grant to Lord Clive, which was free from all conditions of service, was called a "jagir." Similarly, the alleged grant to the Begum Sumroo in Badshahpore, though claimed as a grant free of service, was always spoken of as a "jagir;" and in this province we all know that persons like the defendant, holding revenue-free lands released to them as connected with some religious institution or as a matter of mere favor, very commonly speak of their holdings as "jagir."

This being so, I have no hesitation in saying that in the absence of anything to indicate the contrary we must presume that the interpretation clause by which it was proposed to limit the meaning of the term "jagir" to *service* grants was omitted, not because it was thought the limitation would hold good without it, but because it was thought undesirable to limit the scope of the operative clause relating to "jagirs" in this way, and because it was considered that in the absence of any statutory interpretation the term jagir would be construed in the wider sense.

The two suggested limitations being thus disposed of, I have no hesitation in holding with the Additional Commissioner that the present defendant is a jagirdar within the meaning of the 4th clause of Section 5 of the Act.

It remains to consider whether the defendant has succeeded in proving an occupation of 20 years, and on this point too, as I have already said, I agree with the Additional Commissioner. I think with him that the defendant having obtained his jagir as a grant from the zamindars, the presumption is that he got possession of the land and was not a mere assignee of the revenue leviable upon it.

Then we have the direct evidence of witnesses to show that the defendant located the cultivators whose names appear for several years prior to the second settlement in the nekasees, and took buttai from them, and this is confirmed by important entries in the record of the second settlement.

In the mafi statement of that settlement we find the land entered as "khoodkasht mafidar," and in the khewat we find it recorded that the mafidar is entitled to cultivate the land, and that the zamindars have never taken malikana from him and have abandoned their claim to it. From about the time of the second settlement down to the institution of this suit the mafidar, it is admitted, has had possession.

I do not know what more than this we could want unless we were to expect the defendant to bring direct evidence of his possession for each harvest of the 20 years separately. I would dismiss the appeal with costs.

No. 13.

JOWAHIR SING,—(Plaintiff),—APPELLANT,

Versus

GUNGA PERSHAD & OTHERS,—(Defendants),—RESPONDENTS.

} APPELLATE SIDE,

Case No. 790 of 1877.

(FITZPATRICK AND PLOWDEN, JJ.)

Hindu Law—Ancestral and acquired property—Liability of, for father's debts contracted for immoral purposes—Suit against son as representative—Omission to plead that debts were contracted for immoral purposes—Estoppel.—In October 1875 the present defendants sued the present plaintiff and his brother as the legal representatives of the deceased debtor, Sher Sing, their father. They both admitted the debt, but the present plaintiff pleaded that he had no assets, and that he had been separated 20 years before from his father. The Court granted a decree against the brothers jointly, as representatives, recoverable from the property of Sher Sing, deceased, in their hands.

In execution of that decree a house in the possession of the present plaintiff was attached. He applied for its release on the ground that it had been in his possession for 30 years and was ancestral property, and that the debt sued for had been contracted for an immoral purpose. His application having been rejected he instituted the present suit.

Held that, by Hindu law, both ancestral and acquired estates in the hands of a son are upon an equal footing, and not liable for the father's debts if contracted for an immoral purpose; and, therefore, that as the plea that the debts had been contracted for an immoral purpose would have been a complete answer to the former suit, and the plaintiff had omitted to put it forward, he was now estopped from doing so.

Special appeal from order of Commissioner Ambalah Division, dated 5th March 1877.

Kali Prosono Roy for appellant,

Rattigan for respondents.

The facts are fully stated in the following judgment, which was delivered by

PLOWDEN, J.—In October 1875 the present defendants sued the present plaintiff and his brother, sons of Sher Sing, deceased, for Rs. 1,240-3-6, alleged to be due by Sher Sing to the assignors of the plaintiffs in that suit.

The suit was against the then defendants as legal representatives of the deceased debtor. They both admitted the debt to be correct, but Jowahir Sing, now plaintiff, pleaded that he

had no assets liable to the debt, and that he had been separated 20 years before from his father.

The Court gave a decree against the brothers jointly, and ordered that the decree should be considered to be made against the property of Sher Sing in the hands of his representatives, and remaining arrangements would be made in execution of the decree.

In execution of decree the then plaintiffs attached a house in possession of Jowahir Sing. He applied for its release from attachment on the grounds that it had been in his possession for 30 years and was ancestral property, and that the debt sued for had not been incurred for the benefit of the family, but, at least in part, had been contracted for an alleged immoral purpose, *viz.*, drink. His application was rejected.

The present suit is brought with the object of releasing the house from attachment, and comes before us upon special appeal.

The first Court found the property was ancestral, that the debt was not shown to have been incurred for an immoral purpose, that the plaintiff had not before objected to the legality of the debt, and that he had not held adverse possession of the house.

The Commissioner found that the house in suit belonged to Sher Sing's estate, and that it was liable to be sold in execution of the decree against Dewa Sing and Jowahir Sing.

In this Court it was contended that the plaintiff might show that the debt was incurred for an immoral purpose, notwithstanding the existence of the decree against Jowahir Sing, as representative of his father.

For the respondents it was contended that this course was not open to the plaintiff, who should have pleaded this in the former suit.

In reply to this the Babu urged that there is a distinction between the liability of the paternal estate and of the ancestral estate in the hands of the son for debts incurred by the father: that while the former is liable for all debts of the father of whatever kind, the latter is only liable for his debts not contracted for an illegal or immoral purpose.

If this be a sound distinction something might be said in favor of the Babu's contention that the character of the debt may still be shown notwithstanding the decree in the former suit. But if the distinction is not sound, if ancestral and paternal estates stand upon the same footing as regards liability for the father's debts, the immoral nature of the debt should have been pleaded in answer to the first suit.

No authority was cited for the position contended for by the special appellant nor do I know of any.

The Hindu law, as laid down in the oldest sources, imposes upon a son the pious duty of paying his father's and grandfather's debts, except debts incurred for improper purposes, whether or not he receives assets. That law is not strictly applied in our Courts. As the law is there administered, no legal liability to

pay the debts of the father or grandfather devolves upon the son unless he receives assets, and the liability is limited by their extent. The correct rule seems to us to be indicated by the Privy Council in a passage in their judgment in *Hunooman*

* 6 Moore's I. A. p. 393.

† XIV B. L. R. p. 187.

*Pershad Panday's** case, which was approved in† *Girdhari Lall v. Kantu Lall*.

By Hindu law a son lies under a pious duty to pay his father's and grandfather's debts.

"The freedom of the son from the obligation to discharge the father's debts has regard to the nature of the debt, and not to the nature of the estate whether ancestral or acquired." That is, in regard to the liability of the estate found in the hands of the son, the question is not what is the nature of the estate, but what is the nature of the debt sought to be charged upon it. In short, that ancestral and paternal estates are on the same footing.

In the former case above-cited the contention appears to have been that the son was not liable to discharge the father's debts out of the ancestral estate, and in support of this it might be plausibly urged that the ancestral estate being assets received from the grandfather, was not assets for payment of the father's debts. The answer to this is that the son acquires his interest in the ancestral estate through his father, that through the father the ancestral estate devolves upon him. Therefore *prima facie* both estates in the hands of the son are upon an equal footing.

There seems to be no foundation in authority or in principle for the contention that a son's legal obligation to pay his father's debts is greater than his pious duty or moral obligation when he receives paternal estates only.

The Babu urges that from paternal estates, the son is legally bound to pay even the immoral and illegal debts of his father. But this proposition is opposed to the rule laid down in the cases cited, and is one that cannot be accepted without some clear authority to support it: and it lies at the very root of the contention in this special appeal.

For, to turn to the first point taken, unless there is good reason shown for having omitted to plead the illegality of the debt sued for in the first suit, as that the debt was, if contracted for an illegal purpose, recoverable from the paternal estate, but not from the ancestral estate, and therefore the material question in that stage of the proceedings was merely whether or not the debt was in fact incurred, the question as to which kind of estate was liable for it, and incidentally thereto the question of its nature, being left for future determination. There is no ground for holding that the enquiry into the nature of the debt could be postponed. If it be the law that neither the paternal estate nor the ancestral estate is liable in the hands of the heir for an immoral or illegal debt contracted by the father—as I apprehend the law is—then it certainly behoves an heir to plead the nature of the debt at once or to be concluded by the decree.

Upon the view we take of the law, both the points raised by the Babu must be decided against him.

On the only other question, namely, whether the plaintiff has been in adverse possession for more than 12 years of the house in suit, I see no reason to doubt the correctness of the decision of the Lower Courts.

The proceedings in the insolvency of Sher Sing, show very clearly that the plaintiff has not been in exclusive or adverse possession for so long a period, especially the statement of Sher Sing on April 15th and the rubkar of the 17th of April 1869.

I would accordingly dismiss this special appeal with costs.

9th Novr. 1877.

FITZPATRICK, J.—I concur. If there was any such distinction between ancestral and acquired property as Babu Kali Prosono Roy now attempts to set up, the plaintiff might possibly be in a position to contend that it would have been no defence to the former suit to have urged that the debts to recover which that suit was brought were contracted for an immoral purpose. He might perhaps argue that if he had pleaded the immoral purpose in that suit he would have been met by the reply that, even granting that the debts had been contracted for an immoral purpose they would still be recoverable from the acquired property of the deceased, and that accordingly a decree should be passed for their amount, leaving the question as to what property would be liable in execution of such decree for future determination, inasmuch as it might be that the decree-holder would be able to realize the amount of his decree from the acquired property which admittedly was liable for it.

But, as my learned colleague has pointed out, there is no ground shown for making any such distinction between ancestral and acquired property, and (accordingly) if the house now in dispute is not liable for the debts, no portion of the deceased's estate is liable, and the plea that the debts were contracted for an immoral purpose would have been a complete answer to the former suit. This being so, I agree with my learned colleague that if that ground was ever to be relied on it ought to have been put forward as a plea to the former suit, and that the present plaintiff having omitted so to put it forward is now precluded from relying on it.

This disposes of the main ground of the appeal. On the question of adverse possession it is enough to say that I agree with my learned colleague.

No. 14.

JIWANA MAL,—(Defendant),—APPELLANT,

Versus

MUSST. SADDAN & OTHERS,—(Plfs.),—RESPONDENTS.

APPELLATE SIDE. {

. Case No. 393 of 1877.

(LINDSAY, FITZPATRICK, PLOWDEN AND SMYTH, JJ.)

Hindu Widow—Maintenance—Suit for arrears of, without rate having been fixed, or demand made—Practice.—Held by the Full Bench

(FITZPATRICK, PLOWDEN AND SMYTH, JJ.) that a suit by a Hindu widow for arrears of maintenance, in the nature of a suit for breach of an obligation to maintain, will lie, notwithstanding that the rate of maintenance has not been fixed by agreement or by decree of Court.

Held also by the Full Bench (FITZPATRICK, PLOWDEN AND SMYTH JJ.) that where a maintenance allowance has been fixed no demand is required to be proved to sustain a suit for arrears of such allowance; but where no allowance has been fixed, and the suit is one for damages for breach of the obligation to maintain, it may or may not, according to the circumstances of the case, be necessary to prove a demand in order to establish the breach of the obligation.

Held by the Division Bench (LINDSAY AND SMYTH, JJ.) that the amount allowed for the maintenance of a Hindu widow should be in proportion to her wants, that is, her own support and that of those dependent on her, regard being also had in fixing such amount to the means of the estate and the general circumstances of the particular case.

*Special appeal from order of Commissioner Multan, dated
14th December 1876.*

Rivaz for Appellant.

Kali Prosono Roy for Respondents.

This was a suit for Rs. 450 for arrears of maintenance for three years, brought by a widow in her own behalf, and as guardian of her four minor sons, against her deceased husband's father.

It was found that the husband died about four years before the institution of the suit, leaving a widow and four sons, the plaintiffs; that at the time of his death he was living with his father, the defendant, as a member of a joint Hindu family; that his widow and children continued to reside for about a year after his death with the defendant, who supported them; that at the end of that time defendant turned them out of his house, and that for the three years before the institution of the suit they had supported themselves as best they could.

The first Court gave the plaintiffs a decree for the full amount claimed, being at the rate of Rupees 12-8 per mensem; and this decree was upheld in appeal to the Commissioner.

Thereupon the defendant appealed to the Chief Court.

Rivaz for Appellant.—A suit for arrears of maintenance will not lie unless and until,

(1) a demand for maintenance has been made, and

(2) the rate of maintenance has been ascertained either by a suit between the parties to fix the amount, or by private agreement.—(No. 67 Punjab Record for 1871.)

Kali Prosono Roy for Respondents.—A suit for arrears will lie without previous demand, on the same principle on which a suit on a bond payable on demand was held maintainable in No. 26 Punjab Record 1873, without previous demand made, and the Court is competent in such a suit to fix the rate.

SMYTH, J.—My opinion is that a suit for arrears of maintenance may be maintained notwithstanding that the rate has not

previously been ascertained, and that no demand has been made other than that contained in the plaint at the time of action brought.

I am supported in this view by decisions of the Madras High Court (2 *Madras Reports*, 36), of the Bombay High Court (1 *Bombay Reports*, 194), and of the Allahabad High Court (2 *North-Western Provinces Reports*, 170). On the other hand in a case reported in 6 *Suth. Weekly Reporter*, 37, a claim for arrears of maintenance was disallowed, and Mr. Justice Macpherson remarked that "she" (the plaintiff) "is not entitled to any arrears because there was no demand by her for maintenance till she brought this suit."

I think this case should be sent to the Full Bench for a ruling on the following points:—

1st. Is a suit for arrears of maintenance maintainable when no demand for maintenance has been made other than that contained in the plaint?

2nd. Is such a suit maintainable when the rate of maintenance has never been settled by private agreement or judicial decision?

FITZPATRICK, J.—I agree that the reference should be made.

At the hearing before a Full Bench, Rivaz for appellant further contended that in the cases quoted by Smyth, J. in his referring order, it did not appear whether a demand for maintenance had been made or not. In further support of his previous contention he quoted *Rattigan's Select Cases on Hindu Law*, Vol. II p. 206, *I. S. Weekly Reporter*, p. 252, and VI *Suth. Weekly Reporter*, p. 37.

Kali Prosono for respondents relied on the authorities quoted by Smyth, J. in his referring order, and on the Privy Council judgment in 12 *Bengal Law Reports*, p. 238, and also contended that the expression of opinion in 6 *B. W. R.* was a mere *obiter dictum*.

Rivaz in reply contended that the Privy Council judgment was distinguishable on the ground that in that case there appeared to be a fixed rate.

The following judgments were delivered by the Full Bench.

FITZPATRICK, J.—I find it convenient to answer the second of the two questions put by the Division Bench first, and I think in order to answer it properly it is necessary to bear in mind the distinction pointed out at the hearing by my learned colleague Mr. Justice Plowden, between a suit for damages for a breach of the obligation to maintain, and a suit for arrears of an allowance fixed in commutation of a right to be maintained. Given the obligation and the breach, a suit of the former description it seems to me lies, though the scale on which or the style in which the person entitled to maintenance has a right to be maintained, may never have been reduced to certainty by an agreement or decree of Court. The damages to be awarded would be determined ac-

cording to the general rules fixing the measure of damages in suits for breaches of obligations.

They might or might not be equal to the amount which the Court would award if it were fixing a maintenance allowance prospectively for a period equal to that during which the breach of obligation has continued. Whether they would or not would depend on the circumstances of the case. The main point to be looked to would of course be the amount of damage caused to the plaintiff by the breach of the obligation.

If therefore we are to understand the second question put to us as meaning whether a suit for breach of an obligation to maintain can be sustained before any maintenance allowance has been fixed by an agreement or a decree, I would answer it in the affirmative, and I think we must understand that question in this sense; for to ask whether a suit for arrears of an allowance on account of maintenance could be maintained before the rate of such allowance is fixed would be altogether unmeaning.

Turning now to the first question put, I think that when an allowance on account of maintenance has been fixed by an agreement or decree, a suit for arrears of such allowance can be maintained without proof of a demand. Our Courts do not as a rule refuse a plaintiff a decree in a suit for the recovery of an ascertained sum payable by the defendant merely because he does not prove a demand. They might in some cases refuse the plaintiff his costs if it appeared that he could have had the money by asking for it, but they would not refuse him a decree.

On the other hand, when the suit is not one for arrears of a fixed allowance but for damages for breach of an obligation to maintain, it would in most cases be necessary for the plaintiff to prove that he had applied to the defendant to maintain him and that the defendant had refused. The obligation to maintain clearly does not as a general rule involve a duty to seek out the person to be maintained and offer him food and clothes or money whether he needs it or not. It is as a general rule simply an obligation to maintain if called upon to do so, and when it is so there could of course be no breach until a demand had been made.

But there are clearly some cases in which a breach of the obligation to maintain might occur, and, a suit might consequently be maintained without any formal demand being made, and the case which has given rise to this reference seems to be one of them. If a widow entitled to maintenance is living with the member of her family who is bound to maintain her, and he turns her out of the house, as the defendant in this case is said to have done, he is obviously guilty of a breach of his obligation to maintain her, or rather he repudiates that obligation altogether, and she may maintain a suit for damages without first going back and going through the form of asking to be maintained. I would accordingly answer the first of the two questions put, by saying that where a maintenance allowance has been fixed no demand need be proved in order to sustain a suit for arrears of such allowance; but that when no allowance has been fixed, and the suit is one for damages for breach of the obligation to maintain it may or may

not according to the circumstances of the case be necessary for the plaintiff to prove a demand in order to establish the breach of the obligation. I would add that in the case out of which this reference has arisen, there would be no need to prove a demand.

FLOWDEN, J.—The questions referred for opinion seem to me to be questions of practice rather than of law, and the practice upon the points involved can scarcely be said to be governed at present by any definite settled rules.

Both questions relate to suits for arrears of maintenance, that is to say, for a sum of money by way of an allowance for maintenance or alimony for a period which is past.

Now, I think it may be said with safety, that the Hindu law knows nothing of a money allowance, or alimony. The maintenance contemplated by that law is food and raiment, with residence in the family dwelling house.

The commutation of food and raiment for a money allowance is apparently of quite recent origin, and is the work of our Courts.

The result seems to me to be this: that when a question arises among Hindus, as to the right to be maintained or the obligation to maintain, the existence of the right or obligation must be determined by reference to the Hindu law or custom having the force of law.

When the question is as to the manner in which the right to be maintained is to be enforced, or an omission or refusal to perform the obligation is to be compensated, the question is merely one as to the relief to be given, and belongs not to Hindu law, but to the domain of practice.

I have not been able to find any general rule of practice laid down in the reported cases, and it seems to me very doubtful whether any general rule can be laid down applicable to all cases.

It certainly cannot in my opinion be said that a previous demand is in all cases necessary before a suit for arrears of maintenance can be brought. The obligation to maintain when it exists is not a conditional obligation; and no previous demand would be necessary to a suit for prospective maintenance.

When there has been a clear breach of the obligation to maintain giving rise to a secondary obligation to compensate the person injured, I know of no principle upon which it can be said that a demand must be made before there is a cause of action.

Take the case of a father-in-law wrongfully turning his son's widow out of the house. Could it be said that if she strove to support herself, and failing came into Court and sued for a sum of money by way of maintenance from the day she was turned out, she had no cause of action because she had made no previous demand? or because she and her father-in-law had not settled the rate of maintenance? or because she had not rushed into Court the next day?

Treating the questions referred as questions of practice, it seems to me that no suit should be dismissed merely because no

previous demand for maintenance has been made or no rate settled before suit.

I think it would depend entirely upon the circumstances of each case what the order should be. A case might arise in which it would be just to refuse relief, because no previous notice had been given of the claim, but that is a very different thing from saying that demand is essential in order to give a cause of action.

The view I have endeavoured to express is that the matters referred are points of practice lying within the judicial discretion of the Courts, while the practice is not governed by settled rules.

This seems to me to be borne out by the observations of Sir Lawrence Peel in the case (reported at *Vyavastha Darpana*, p. 384, and *Rattigan's Select Cases*, p. 202) which was quoted with approval by the Privy Council in the case at XII B. L. R. p. 328.

There he says "We shall award 10 Rs. per month, and the back maintenance must date only from the date of the demand. We might in a proper case say there shall be no back maintenance, and further maintenance should be enjoined only on the condition of residence with the late husband's family; but in this case, we think there is no ground for attaching any such condition to the award of maintenance."

In my opinion, then, both questions referred should be answered in the affirmative, on the ground that no previous demand for maintenance or previous settlement of the rate is by law essential to entitle a person to claim arrears of maintenance by a suit.

SMYTH, J., I concur with Mr. Justice Plowden.

5th Decr. 1877.

The appeal having been remitted back to the Division Bench came on for hearing before Lindsay and Smyth, JJ. The judgment of the Division Bench was delivered by

LINDSAY, J. The questions referred to a Full Bench have been answered in the affirmative.

We now proceed to determine this appeal. The question is upon what principle have the Courts fixed Rs. 12-8 p. m. as the sum payable to the widow, the plaintiff.

The rate fixed may be correct, but the principle upon which the amount has been fixed, viz Rs. 12-8 p. m. is not shown.

After the widow's husband died, the family consisted of the father, two sons and two unmarried daughters, besides the widow and her four children; one child has since died.

The share of the deceased husband at the time of his death at the outside would have been Rs. 150 p. a. assuming the profits to have been Rs. 600 p. a. as alleged.

But against this we have to bear in mind that the father had to support two unmarried daughters. What their maintenance would cost we are not in a position to state. That must be determined by the Lower Courts.

We give an extract from the *Tagore Lectures* for 1870, at pp. 140, 141, which fairly describes the principles which should guide a Court in determining the amount of maintenance payable to a widow.

“ Before partition, she is entitled to maintenance to the extent which is equivalent to the use of the joint property, in the same way as her husband was entitled to it, remembering always that as a female she is under the protection of her natural guardian.

“ The amount allowed for the maintenance of a widow should be in proportion to her wants, that is, sufficient for her own support and that of those immediately dependent on her. The means of the estate should be considered, and the general circumstances of the particular case, the guide for settling the amount of maintenance, there being no fixed rate or proportion laid down.”

We remand the case to the first Court for re-trial and determination with reference to the above remarks.

All costs to be costs in the cause.

No. 15.

BAJA KHAN,—(Plaintiff),—APPELLANT,

Versus

BIRJU, DULA & BATTALIA,—(Defdts.),—RESPONDENTS.

} APPELLATE SIDE.

Civil Case No. 274 of 1877.

(FITZPATRICK AND FLOWDEN, JJ.)

Joint immoveable property, owned by Hindus—Sale of Share in—Right of Mahomedan auction purchaser to partition.—R. obtained a decree against one M., a Hindu, in execution of which M's eighth share in a haveli was sold by public auction, and purchased by B. K. a Mahomedan. In a suit instituted by B. K. for partition, which was resisted by the remaining sharers in the haveli, who were Hindus, held that B. K. was entitled to partition and possession of the share purchased by him.

Regular appeal from order of Commissioner Jalandhar, dated 7th December 1876.

Rattigan for Appellant.

Spitta for Respondents.

One Rahim-ud-din obtained a decree against Milkhi, in execution of which he had sold Milkhi's eighth share in a haveli at Jalandhar. The plaintiff, Baja Khan, became the purchaser at the auction sale for Rs. 400, and accordingly sued for partition and possession of the share so purchased by him. The first Court decreed the claim.

The Commissioner on appeal held "that the sale was of pro-perty of which it was impossible to give possession." He also found "that the whole transaction was a collusive one, plaintiff pretending to buy the share in collusion with the decree-holder "Rahim-uddin, with intent to compel the other sharers to make "up this amount (*i. e.* the amount of purchase money) to be paid "over to Rahim-uddin if obtained." The Commissioner accordingly held the sale to be invalid, and that Rahim-uddin (who was no party to the suit) should repay the amount received back to the Court for delivery to plaintiff.

From this order plaintiff appealed to the Chief Court. The following judgments were delivered :—

FITZPATRICK, J.—If the Commissioner's decision was to be understood as meaning that a decree was to issue against Rahim-ud-din for refund of the purchase money, it of course could not be sustained, as Rahim-ud-din is no party to the suit.

I think however that what is meant is that the plaintiff's suit should be dismissed and the plaintiff left to recover his money in further proceedings against Rahim-ud-din.

But even taking the decision in this sense I do not think it can be upheld. I am not quite sure that I understand rightly what

the Commissioner means by the sale being a "collusive one, plaintiff pretending to buy the share in collusion with the decree-holder." Apparently what he means is that the decree-holder was the real purchaser. But suppose he was, and suppose, as the Commissioner thinks he did, he bid up beyond the real value of the property in the hope that the judgment-debtors or their friends would be induced to bid higher still to avoid the annoyance and inconvenience of having a stranger as a sharer in the house, how could this affect the validity of the sale? The decree-holder had a perfect right to bid up and raise the price as high as he pleased, provided he chose to take the chance of having the property knocked down to him and left on his hands at a price (to be deducted from the amount of his decree) exceeding its real value. And as to there being practical difficulties about a partition, that would not affect the validity of the sale.

There doubtless are practical difficulties when a share in a house of this sort is sold in execution. One party or the other is sure to demand a partition, as the plaintiff in this case has done, and the result I believe is that for want of a law enabling the Courts to deal properly with such cases an actual partition has to be made some how or other as best it may, and the parties are left either to buy one another out or to devise the most extraordinary shifts and contrivances for screening off their respective portions from one another.

But no case has been cited to us in which it has been held that for this reason a share should not be sold in execution, or that on a share being sold the purchaser could not demand a partition.

The Commissioner's decision must be reversed, with costs to the appellants.

3rd Augt. 1877.

LOWDEN, J.—I have had considerable doubt as to the proper order to be made in this case. After consideration I have come to the conclusion that it is very doubtful whether there is, as the law at present stands, any power in the Civil Courts to direct what alone would appear to afford an equitable solution of such a difficulty as has arisen in this case, namely to direct that the property be sold as a whole, power being reserved to the parties to bid for it, and the sale proceeds being divided according to the extent of their respective interests.

Nothing short of necessity would justify the Courts in assuming such a power, in the absence of an express provision of the law empowering them to give such directions. It would be necessary to shew either that a partition was physically impossible or that the inconvenience arising from a partition would be so utterly insupportable that justice imperatively demanded that partition should not be effected. Neither of these conditions is here established. It is not shewn that partition is impossible, and I do not think the circumstance that the purchaser claiming partition is a Mahomedan and the owners of the remaining shares in the property are Hindus is sufficient ground for refusing partition. It does not necessarily follow that because the purchaser is entitled to personally occupy the portion of the premises allotted to him he will do so or that his personal residence there will disable the other sharers

from occupying their own portion of the premises though it may cause them some discomfort.

The division must of course be made in such a manner as to cause the least possible inconvenience to those already in possession, consistently with the purchaser receiving his proper share of the premises.

The leading authority as to the purchaser's right to actual possession is a Full Bench ruling of the Bengal High Court in 2 *S. W. R. Misc. C.* p. 30, which has subsequently been followed, and which should, I think, govern our decision in cases like the present until the law is amended. It is proposed to give a power such as I have above mentioned in the Bill relating to the transfer of property now before the Legislative Council.

With these observations I assent to the order proposed by my learned colleague.

No. 16.

MAMRAJ,—(Plaintiff),—APPELLANT,

Versus

MUSSTT. BELASO, GUARDIAN OF GUNGA RAM,—
(Defendant),—RESPONDENT.

} APPELLATE SIDE,

Case No. 489 of 1877.

(PLOWDEN AND SMYTH, JJ.)

Ancestral property—Liability for debts of deceased father—Debts contracted for immoral purposes—Onus of proof.—No inflexible general rule can be laid down, in a suit by a creditor against the son of a deceased Hindu, in order to declare ancestral property in the hands of the latter liable to sale in satisfaction of the debt sued upon, as to whether the plaintiff is bound to prove the nature of the debt, or the defendant.

Question discussed as to whom the onus would lie on under certain circumstances.

Regular Appeal from order of Additional Commissioner, Delhi Division, dated 11th December 1876.

Rattigan for Appellant.

In the Chief Court the following judgments were delivered:—

PLOWDEN, J.—The question at issue in this appeal is whether *14th Aug. 1877.* in a suit by a creditor against the son of a deceased Hindu, in order to declare ancestral property in the hands of the latter liable to sale in satisfaction of the debt sued upon, the plaintiff is bound to prove the nature of the debt, or the defendant.

For the plaintiff, appellant, it is contended that the burden of proof lies upon the defendant to show that the debt was incurred for an improper purpose, and that in default of such proof the

plaintiff is entitled to succeed upon proof of a loan contracted by the father. And we have been referred to the Privy Council decision in the case of *Girdhari Lall v. Kantu Lall*, 14 B. L. R., 187.

I am clearly of opinion that in that case no rule was laid down on the precise point before us, and no rule is to be deduced from the expressions in that case, nor am I aware of any authority bearing directly upon the point.

In my opinion it would be difficult to lay down any inflexible general rule on the subject, and it is not desirable to attempt it.

In the present case the debt sued upon was contracted by the deceased Anant Ram from plaintiff in person, some 7 years ago, and the defendant is a minor. No decree was obtained against the father in his life-time.

The plaintiff is thus in a position to declare affirmatively of his own knowledge the circumstances under which the debt was contracted, and he has made a statement on the point. The son knows nothing and could know nothing of the circumstances.

The plaintiff is seeking to charge the estate in the hands of the minor heir, and assuming that the defence were simply that the debt was never incurred, it would clearly lie upon the plaintiff to prove that the money was advanced, and if he alleged that it was advanced for a specific purpose it would I think rest with him to prove his allegation.

It seems to me that he is bound to prove affirmatively all that is necessary to be proved in order to charge the estate in the hands of the heir before the latter is called upon to prove anything.

Now, as the heir is not bound to discharge *all* debts of his ancestor there must I think be at least *prima facie* proof that the debt is of such a nature as to render the estate liable, at least when the circumstances are such that the plaintiff might have had and professes to have had some knowledge of the purpose for which the money was required. It might be otherwise if the plaintiff came into Court under such circumstances that he knew nothing more than the fact that the money had been advanced: if for instance the debt were one due to his father, who had kept no books, and the plaintiff had been a stranger to the transaction. Perhaps in that case the presumption that the debt was incurred for a legitimate purpose would properly arise in his favor.

Granting that the presumption is generally speaking in favor of a debt being incurred for a proper rather than for an improper purpose, it has been held that a like presumption in favor of a person that he would not transgress the provisions of a statute, must give way before the rule that when the subject-matter of the allegation lies peculiarly within the knowledge of one of the parties he must prove it, and that the presumption did not discharge him of the "onus."—(*I Taylor on Evidence*, pp. 379, 381, 5th Edition). Now in this case the Court has held that the plaintiff having specifically alleged that the loan was made for a certain purpose has failed to prove it, and has dismissed the suit.

The dismissal appears to me to involve simply a finding that the plaintiff has failed to prove affirmatively that the debt with which he seeks to charge the inheritance was a debt for which the estate was liable in the hands of the heir, he (plaintiff) being in a position to know and asserting that he did know the object for which the loan was made.

I think, though I admit the question is one of some nicety and difficulty, that the suit upon that finding was properly dismissed, having regard to Sections 101, 102 and 103 of the Indian Evidence Act.

The finding it must be observed is not the same as a finding that the debt is proved to be incurred for an improper purpose, nor does it involve any presumption that it was incurred for an improper purpose. It is a purely negative finding and nothing is presumed. It amounts to this: "nothing is proved by the plaintiff as to the nature of the debt sought to be enforced, and the defendant cannot under the circumstances be called upon to prove anything, the suit must therefore be dismissed as the plaintiff has failed to show himself entitled to the relief sought."

I do not think the fact that the defendant, a minor, has suggested that the debt was incurred for an immoral purpose affects the true question. For it does not lie upon him to prove this unless and until the plaintiff has made out a *prima facie* case of a liability on the defendant.

Further, if the general presumption be in favor of the claim, namely that the debt was incurred for a proper rather than an improper purpose, I think very slight evidence of a likelihood that the debt may have been incurred for immoral purposes would be sufficient, in a case like the present where there could be no special knowledge on the part of the defendant to rebut the presumption and shift the burden of proof back upon the plaintiff. In the present case there is such evidence to the effect that the deceased debtor was a man of loose habits and immoral character.

Upon the whole case I think the order of the Additional Commissioner was correct, and that this appeal should be dismissed with costs.

SMYTH, J.—The circumstances of the present case, and the grounds upon which the Additional Commissioner held that the burden of proving the purpose for which the debt was contracted by the deceased Anant Ram was upon the plaintiff are thus described by the Additional Commissioner in his judgment of the 11th December 1876 :—

14th Augt. 1877.

"It has to be considered that when the debt was incurred about 4 years ago Gunga Ram was a minor, and the affairs of the family were managed by Anant Ram, his father, who was the only person competent to manage them.

"The question is not of any alienation made by him, but whether the debt was one for which the ancestral property can be held liable. The defendant's reason for calling this in question is that Anant Ram was a spendthrift and incurred con-

“siderable expenditure for immoral purposes, for which the ancestral estate would not be liable. Under these circumstances the principle laid down in Section 106 of the Indian Evidence Act that ‘when a fact is especially within the knowledge of any person the burden of proving that fact is upon him,’ seems to apply. In the case of *Hanuman Parshad Panday v. Mussammat Babooee Munraj Koonweree* (6 *Moore’s Indian Appeals*, page 392) the Judicial Committee of the Privy Council observed that a lender of money may reasonably be expected to prove the circumstances connected with his own particular loan’ and after the death of the borrower his heirs cannot be said to be in as good a position for doing so as the lender is.

“When therefore they have a reasonable ground for believing that the loan is not one for which they are liable, the burden of proof of the circumstances under which the debt was incurred would seem to rest upon the lender. I therefore hold that the burden of proof is in the present case upon the plaintiff.”

The Additional Commissioner then proceeded to consider the evidence adduced for the plaintiff, and in the result found that the plaintiff has failed to prove that the debt was incurred for purposes for which the estate can be charged in the hands of the heirs.”

I interpret the Additional Commissioner’s decision to mean that when a debt is contracted by a Hindu, his son being at that time a minor, and when after the debtor’s death proceedings are taken by the creditor to make the ancestral property liable for the debt, and when in such proceedings the son shows that the father was a spendthrift and used to incur considerable expenditure for immoral purposes, the burden of proving that the debt was not incurred for an immoral purpose will be shifted on to the plaintiff.

I am not prepared to hold that the rule which would impose the burden of proof on the plaintiff under the circumstances thus stated would in all cases be a just one.

The Additional Commissioner has relied upon a remark of the Privy Council in the case of *Hanuman Parshad* without considering the circumstances of that case or the particular class of cases which the Privy Council had in view when they made it.

In those cases the loan was charged upon the ancestral land at the time the money was advanced by the lender, and as it may therefore be presumed that the lender contemplated the contingency of having to proceed against the ancestral estate to obtain repayment, and as he knew that such a charge would be valid only when the loan was raised for necessary purposes, it is only reasonable to suppose that he would make the necessary enquiries into the circumstances of the loan and satisfy himself as to its necessity before advancing the money.

It may be well to quote the Privy Council’s remarks in the case referred to at greater length than was done by the Additional Commissioner. A *dictum* of the Agra Sudder Court had been quoted and relied on in support of the contention that where the

factum of a deed of charge by a manager for an infant is established, and the fact of the advance is proved, the presumption of law is *prima facie* to support the charge, and the onus of disproving it rests on the heir; and in answer to this the Privy Council made the following observations, among which the passage referred to by Mr. Barkley occurs:—"But the *dictum* there though general must be read in connection with the facts of that case. "It might be a very correct course to adopt with reference to "suits of that particular character, which was one where the sons "of a living father were, with his suspected collusion, attempting "in a suit against a creditor to get rid of the charge on an ancestral estate created by the father on the ground of the alleged "misconduct of the father in extravagant waste of the estate.

"Now, it is to be observed that a lender of money may "reasonably be expected to prove the circumstances connected "with his own particular loan, but can not reasonably be expected "to know or come prepared with proof of the antecedent economy "and good conduct of the owner of an ancestral estate; while "the antecedents of their father's career would be more likely to "be in the knowledge of the sons, members of the same family, "than of a stranger; consequently this *dictum* may perhaps be "supported on the general principle that the allegation and proof "of facts, presumably in his better knowledge, is to be looked for "from the party who possesses that better knowledge, as well as "on the obvious ground in such suits of the danger of collusion "between father and sons in fraud of the creditor of the former. "But this case is of a description wholly different, and the *dictum* "does not profess to be a general one, nor is it so to be regarded.

"Their Lordships think that the question on whom does the "onus of proof lie in such suits as the present is one not capable "of a general and inflexible answer. The presumption proper to "be made will vary with circumstances, and must be regulated by "and dependent on them.

"Thus, where the mortgagee himself with whom the transaction took place is setting up a charge in his favor made by one "whose title to alienate he necessarily knew to be limited and "qualified, he may be reasonably expected to allege and prove "facts presumably better known to him than to the infant heir, "namely those facts which embody the representations made to "him of the alleged needs of the estate, and the motives influencing his immediate loan."

The circumstances of the present case are wholly different. Here there was no charge created on the estate. The money was advanced as an ordinary loan, and an ordinary bond or *tumussuk* was taken for its repayment.

It would be very unsafe in my opinion to hold that in all such cases a lender is bound to enquire into the circumstances of the loan or to put upon him the burden of proving the necessity for the loan. The lender in such cases looks ordinarily to the borrower himself for repayment. The contingency of his death before repayment is not contemplated or provided against; and he would be an extraordinarily prudent man in my opinion who would in

all cases enquire into the circumstances of the loan and its necessity and note them down for reference in the event of the borrower's death. I confess I lean to the view that a presumption should ordinarily be raised in favor of the creditor that the loan was for a proper purpose, and that not until a strong *prima facie* case had been made out by the heir that the money may reasonably be supposed to have been raised for an improper purpose should the creditor be required to prove that the loan was for a proper purpose. Under peculiar circumstances a creditor no doubt might well be called upon to prove the purpose for which the loan was raised : for instance, where he was dealing with a notorious spendthrift and profligate. If a creditor advances money to such a person and seeks to make the ancestral estate liable for it, it is not too much to require him to show that the money was advanced for a proper and not for an immoral purpose.

I fully concur however with my learned colleague in holding that no inflexible general rule can be laid down in these cases.

To use the words of the Privy Council already quoted, "the question on whom does the onus of proof lie in such suits as the present is one not capable of a general and inflexible answer. The presumption proper to be made will vary with circumstances, and must be regulated by and dependent on them."

In the present case the defendants produced evidence to show that Anant Ram was a spendthrift. His son, the defendant, is still a minor. Nothing is known or could be known to him personally of the circumstances under which the loan was contracted, or of any proper purpose to which it could have been applied.

The plaintiff made no claim for the money in Anant Ram's lifetime, and allowed a long time to elapse before suing. Under these circumstances I think the onus of proving the circumstances of the loan was rightly put upon the plaintiff ; and as he alleged that the loan was taken for building purposes and failed to prove it was so taken, I think his suit was rightly dismissed. I thus come to the same conclusion as my learned colleague, though on somewhat different grounds, and would dismiss this appeal with costs.

No. 17.

LATCHMAN,—(Plaintiff),—APPELLANT,

Versus

HEM RAJ,—(Defendant),—RESPONDENT.

Case No. 898 of 1877.

(FITZPATRICK AND FLOWDEN, JJ.)

APPELLATE SIDE. }

Hindu Law—Adoption—Relinquishment of status—Disinherison—Held that, according to Hindu law an adopted son cannot relinquish his status, nor be disinherited by his adoptive father.

*Special Appeal from order of Deputy Commissioner Sirsa, dated
20th April 1877.*

Rattigan for Appellant.

Rivaz for Respondent.

The plaintiff in this suit sued for a declaration that he was the adopted son of Chunni Ram, deceased.

It was found by the Courts below (Tahsildar and Deputy Commissioner) that the plaintiff was adopted by Chunni Ram: but both those Courts refused him the declaratory decree he sought, the Tahsildar basing his refusal on the ground that the plaintiff relinquished his status as adopted son, and the Deputy Commissioner on the ground that Chunni Ram disinherited him.

The plaintiff accordingly appealed to the Chief Court.

Rattigan for appellant contended that an adopted son could not abandon his status or be disinherited. He cited the following authorities.

Macnaghten's Hindu Law (Madras edition) page 80, precedent No. 13.

Norton's Leading Cases, page 101.

1 Borradaile S. D. Reports (Bombay) page 75.

1 Hay's Reports 205; S. C. Marshal 317.

Agra Sudder Court Reports, 1865 (case of *Ram Sunderdas v. Mussummat Ram Kour.*)

No. 15 Civil Judgment *Punjab Record 1877.*

Rivaz for respondent admitted that according to strict Hindu law an adopted son could be disinherited only on the same ground as a natural son. He relied on the custom of the Punjab, citing Section 7 Clause 2 of the Punjab Civil Code (page 219 of Tremlett's Code) and pp. 78 and 81 of Boulnois' and Rattigan's Notes on Customary Law.

Rattigan in reply, as regards the passage in the Notes on Customary Law, pointed out that there was something more than a mere taking over by an agriculturist in the present case, the parties being of the Khatri caste.

The following judgments were delivered :—

FITZPATRICK, J.—It is clear that under the Hindu law it was *6th Novr. 1877.* not competent to the plaintiff to relinquish his status, or to Chunni Ram to disinherit him in the manner described, and it is nowhere suggested that there is any special custom applicable to the case. This being so, we must hold that there was no power on either side to put an end to the relationship created by the adoption.

We accordingly reverse the decisions of the lower Courts with costs (including pleader's fee Rs. 16) and declare the plaintiff to be the adopted son of Chunni Ram.

6th Novr. 1877.

LOWDEN, J.—Both the lower Courts in this case have virtually found that the plaintiff was adopted by the deceased Chunni Ram, and the first Court further finds that plaintiff abandoned that status, while the second holds that the adoptive father disinherited the plaintiff for misconduct, being legally competent to do so.

There is express authority for holding that under the Hindu law an adopted son cannot abandon his status—*Madras S. R.* for 1855, page 41, cited at page 18 of *Norton's Leading Cases*, and that an adopted son cannot be disinherited by a second adoption—1 *Morley's Digest*, page 24, a Bombay case also cited by Norton. A decision of the Calcutta High Court, reported at 1. Marshall, page 317, is an authority for holding that the adoptive father cannot disinherit his adopted son.

This case was followed in the decision of this Court reported as No. 15 of the *Punjab Record* 1877.

We were referred by the counsel for the respondent to the Punjab Civil Code, Section VII, para 2, as indicating the law upon the point in this province. The passage quoted is the following :—“By the Hindu law an adopted son may be disinherited for gross misconduct, but this doctrine must be applied with caution.” I think it is material to notice that this passage professes to be stating the Hindu law, as understood by the compiler of the code, and not to be recording any local custom, and the commentary on the code supports my view of this passage.

Now it is undoubtedly true that there are passages in the commentaries on the Hindu law which justify the position that a natural son may be excluded from inheritance on certain grounds, and it must be conceded that the adopted son can claim no better position. A full statement of these grounds will be found in the Madras edition of *Macnaghten's Principles and Precedents of Hindu Law*,* and it is not necessary to enumerate or discuss them here in detail. It is I think sufficient to make a few brief observations.

First, that if the passages cited in support of the doctrine contain the true rule to be applied, there is scarcely a single case in which a son might not be lawfully excluded from inheritance, while apparently not a single case has occurred in any Court in India where exclusion has been enforced. Next, that the penalty for misconduct and the like is limited (except in in one class of cases) to exclusion from inheritance, the excluded son remaining entitled to be maintained out of the estate of his father. On the whole, I think we are justified, if not bound to follow the recently reported decision of this Court, and in holding that whatever may have been the original doctrine of the Hindu law as to the exclusion of a natural or an adopted son, on certain grounds, including gross misconduct, such as theft of his father's property, the doctrine that now prevails is that a father cannot disinherit his adopted son for such conduct. It was also pressed upon us by the counsel for the respondent that an adoption in the Punjab is not the same in its nature as an adoption under the Hindu law : and we were referred to the chapter on adoption in the “*Notes on Customary Law*,” in which it is said that the so-called adoption of

* See Precedents, Case V, p. 133, Note.

this province frequently resembles the appointment of an heir rather than an adoption strictly so-called. Without impugning this doctrine it may be observed that it is not an essential part of it that the appointment once made should be revocable at will, or for reasonable cause.

There is no suggestion upon the record of this case that it is so revocable by custom, special or general, and we are not aware of any such custom having been judicially recognised. It is possible that in parts of this province there may be some such custom, and if it were to be satisfactorily established by evidence that an adoption operating as appointment of an heir was conditional upon the good conduct of the adopted son, and was revocable for sufficient cause, I know of no reason why this Court should refuse to recognise and give effect to the custom.

But it seems to me that the presumption is altogether in favor of the appointment being absolute, and irrevocable, in the absence of cogent evidence that it is otherwise; and as the record stands I do not think we should be justified in directing an enquiry into this point.

It is also to be noticed that the parties in this case are Khuttries, and that in their answer to the claim the defendants referred to the Hindu law in support of a portion of the defence.

For the reasons above given, I concur in reversing the decisions of the lower Courts, and in the order proposed by my learned colleague.

No. 18.

CHOWGATTA,—(Plaintiff),—APPELLANT,

Versus

CHATAR SING & DAL SING,—(Defendts),—RESPONDENTS,

} APPELLATE SIDE,

Civil Case No. 625 of 1877.

(FITZPATRICK AND PLOWDEN, JJ.)

Registration—Act VIII of 1871, Sections 17 and 49—Evidence Act (I of 1872), Section 91—Unregistered mortgage accompanied by possession—Subsequent registered mortgage—Admissibility of parol evidence.—C. S. mortgaged his land to D. S. by deed dated 26th July 1873 for Rs. 620. The deed, however, was not registered as required by Section 17 of Act VIII of 1871. C. S. again mortgaged the land to one C. by registered deed dated 13th July 1874 for Rs. 700. In a suit by C. against C. S. and D. S. for possession of the mortgaged lands:—*Held* that the unregistered mortgage to D. S. whether accompanied by possession or not was invalid as against the registered mortgage to C., and that D. S. was precluded by Section 49 Act VIII of 1871 from proving that the land was mortgaged to him under the deed of 1873, and was further precluded by Section 91 of the Evidence Act, 1872, from proving it by oral evidence.

*Special Appeal from order of Commissioner and Superintendent
Multan Division, dated 22nd March 1877.*

Suraj Bul, Pandit, for Appellant.

Mullins for Respondents.

The facts are sufficiently stated in the following judgments.

9th Novr. 1877.

FITZPATRICK, J.—The Commissioner states the facts of this case as follows.

“Chutter Sing mortgaged the land in dispute to Dall Sing by deed dated 26th July 1873 for Rs. 620. The deed was unregistered—mortgaged (*i. e.* Chutter Sing mortgaged) the land a second time to Chowgatta by deed dated 13th July 1874 for Rupees 700. This deed was registered.”

The present suit is brought by Chowgatta against Chutter Sing and Dall Sing. It is described as a suit for *dakhil kharij*, but it is agreed here that it is to be taken to be a suit for possession.

It has been dismissed by both the lower Courts. The grounds on which it is dismissed by the first Court need not now be considered; but the ground on which it has been dismissed by the Commissioner appears to be that, as by Section 48 of Act VIII of 1871 even an oral agreement if accompanied or followed by possession holds against a subsequent registered document, *a fortiori* an unregistered written document if accompanied by possession must. I understand the plaintiff (appellant here) to contend that there is no evidence on the record to support the allegation that Dall Sing got possession under his mortgage of 1873, but I have not thought it necessary to go into this point because I am of opinion that that mortgage having been made by an unregistered deed cannot whether accompanied by possession or not be regarded as valid. In arguing that because a prior oral mortgage accompanied by possession holds good against a subsequent registered mortgage, therefore a prior written mortgage which required registration under Section 17 of the Act, but was not registered, must if accompanied by possession similarly hold good, the Commissioner seems to have forgotten that there is between the oral mortgage and the unregistered written mortgage this distinction that, while the former is a legally valid transaction the latter is prevented by Section 49 of the Act from affecting the property in any way or from being used as evidence of any transaction affecting the property.

The truth is, no question of priority like that provided for by Section 48 of the Act arises here at all, for the simple reason that Dall Sing is not in a position to prove that the land was mortgaged to him in 1873 as he alleges. Section 49 of the Registration Act prevents his proving it by his deed, and Section 91 of the Evidence Act prevents his proving it by oral evidence.

The fact that he is in possession (assuming him to be so) can not help him in any way in a case of this sort, where he has to rely on a special title to a limited interest in the land.

This seems to me so clear that I should not have deemed it necessary to say more, if it were not that in the case reported in 14 Cal. W. R. 250, and which is mentioned with approval in some

later cases, and apparently followed as an authority in the case reported in 9 *Bombay H. C. Reports*, 151, a different view seems to have been taken.

It should be stated that before that case was heard it had been held by Mr. Justice Markby (Mr. Justice Jackson concurring) in the case of *Salim Shaikh v. Boidonath* (12 *W. R.* 217) that notwithstanding Section 48 of Act 20 of 1866 (the Act applicable to the case) a verbal grant would if accompanied by possession take effect as against a subsequent registered instrument.

There was much difference of opinion at the time as to whether that decision was right. As the legislature has in the Act of 1871 adopted in express terms the rule enunciated by Mr. Justice Markby the particular point has since become of less importance, and at all events it is unnecessary for the purposes of this case to pronounce any opinion regarding it.

But it so happened that about a year after Mr. Justice Markby's judgment had been delivered a case came before Jackson and Dwarkanath Mitter, JJ., (14 *Calc. W. R.* 250) in which in opposition to a registered pottah relied on by the plaintiff, the defendant set up a lease of earlier date which required registration under Section 17 of Act 20 of 1866, but which had not been registered, and the Court held that the prior unregistered lease should prevail because it had been accompanied by possession. Mr. Justice Jackson in delivering the judgment of the Court said:—

"It has been held" (he referred to Mr. Justice Markby's judgment above mentioned) "that where possession has been given, that is, where effect has been given to a document by the transfer of immovable property, the provisions of Section 48 of Act 20 of 1866 will not apply. And therefore if the lease to the defendant in this case be dealt with merely in the view of a parol verbal contract the lease granted to the plaintiff subsequently, though registered, will not prevail."

These are the grounds of the decision, and it will be seen they are by no means clear.

The prior transaction to which effect was given in the case before Mr. Justice Markby, was not effected, as it is here assumed to have been, by a *document* which required registration and was nevertheless left unregistered, but by word of mouth; and it is possible that the importance of this distinction was overlooked.

On the other hand, from the suggestion that the lease to the defendant might be "dealt with merely in the view of a parol verbal contract" it might be supposed that this distinction was kept in view, but that it was considered that the defendant might throw aside his lease and fall back upon the understanding at which the parties must have arrived by verbal negotiation before it was executed. But that there is nothing to fall back on in such a case is I think clearly shown in the judgments recently delivered in this Court in the case of *Badra v. Mukhna* (No. 7 of 1877). Thus, whichever view I take of the judgment of the Calcutta Court I am unable notwithstanding the respect I feel for the learned Judges who pronounced it to approve of it. Dal Sing I

think can make nothing of his alleged mortgage of the year 1873, and the plaintiff will accordingly be entitled to a decree unless Dal Sing is able to make out the fresh case which is set up for him here. That case is in substance that long before the mortgage of the year 1873 Dal Sing had obtained a mortgage of the land, had got possession under it, and was in possession at the time of the mortgage of 1873.

If this is true the fresh mortgage of 1873 being as I hold a mere nullity the old mortgage would in my opinion be still a subsisting and valid one, and would under Section 48 of the Act of 1861 be entitled to priority to the mortgage relied on by the plaintiff. I think that looking to the summary manner in which the case was disposed of by the Lower Courts Dal Sing ought to be allowed an opportunity of proving his allegations, and I would remand the case to the first Court for an enquiry as to whether the land was at the time the mortgage deed of 1873 was executed in the possession of Dal Sing under an earlier oral mortgage.

9th Novr. 1877.

LOWDEN, J.—The legal question in this appeal is whether under Act VIII of 1871, a subsequent registered deed of mortgage without possession can take effect in priority to an unregistered deed of mortgage accompanied by possession, both deeds having been executed after Act VIII of 1871 came into force in the Punjab, and both being deeds of which registration is under Section 17 of that Act compulsory.

I think it is clear that Section 48 of the Act does not apply. That merely gives priority to all duly registered documents not testamentary over oral agreements relating to the same property, unless when the latter have been accompanied or followed by delivery of possession. This particular case does not fall within this Section, because the title set up is not by oral agreement accompanied or followed by possession but a deed. Whether if the deed fail the mortgagee can set up a parol agreement is a distinct question which will be separately noticed. I think it is also clear that Section 50 does not apply to this case, because that Section only gives priority to duly registered documents of which the registration is optional over unregistered documents.

It does not give a like priority to registered documents of which the registration is compulsory. A change in the law on this point has been introduced by Section 50 of the new Act of 1877.

The question then falls to be decided under Section 49 of the Act, if it applies, and I am of opinion that it does for this reason. The person in possession asserts a title in himself to a limited interest in the land, that is as mortgagee, and not an absolute interest as owner. His possession is not evidence of the limited interest, though it would be *prima facie* evidence of ownership. He cannot therefore rely upon his possession alone but must rely upon his deed of mortgage, and that by Section 49 cannot be received as evidence of the mortgage nor be permitted to affect the property comprised therein.

The question arising in this case is somewhat different from the questions which have arisen as to the right of a subsequent

purchaser whose deed is duly registered to recover possession from a prior purchaser from the same vendor, the purchaser being in possession under an unregistered deed of sale.

There the right of the prior purchaser may be supported upon the ground that he is in possession, which is sufficient proof of title against all but the true owner (*Ashar v. Whitlock*, L. R. 1. Q. B. p. 1); and secondly, because the first owner having once conveyed away his absolute interest had no interest remaining in him to convey. Whether the decisions on this point be right or not they seem to me clearly distinguishable from the present case.

Thus, the subsequent mortgagee claiming under the registered deed is entitled to succeed so far as the Registration Act governs his rights unless the prior mortgagee is entitled to rely upon an oral agreement accompanied or followed by possession.

This it appears to me he is forbidden to do by Section 91 of the Evidence Act if, as is the fact in this case, the oral agreement preceded the deed and both agreement and deed formed parts of one and the same transaction. No authority is needed to explain the plain language of the Act, but if it were, there is the direct authority of Sir Barnes Peacock in the case of *Sheikh Rahmatulla versus Sheikh Sariut-ulla* I. B. L. R., F. B., page 59, followed by Couch C. J. in the case at 6 Bo. H. C. p. 59, A. C. J.

There is however a case at V. B. L. R. App. p. 86, 14 S. W. R. p. 250, which is in favor of the possession of a person who is in possession with only a qualified interest under an unregistered instrument which ought to have been registered. That was a case of a lease.

The grounds of that decision are not very clearly stated. One of them appears to be that the written lease was in no worse position than a parol lease, and that as the latter accompanied by possession would not fall within Act XX of 1866 Section 48, which had been construed to have the same effect as Section 48 of Act VIII of 1871 undoubtedly has, the unregistered lease could not be postponed to the registered lease. But the case evidently did not fall within Section 48 of Act XX of 1866.

The judgment however discloses the fact that there was some evidence that the plaintiff had been in possession not as owner but only as tenant, that is, there was evidence that he had been in possession paying rent, and perhaps on this ground the decision may be distinguished and supported.

The broad question it seems to me, may be thus strictly stated. Is the case of a title to immovable property when once completed by transfer of possession unaffected by the provisions of the Registration Act of 1871. If it is it must be so because the case is impliedly excepted both in Section 49 and Section 50. Now it is to be observed that prior to the passing of Act VIII of 1871, there was no exception in Section 48 or in Section 49 or Section 50.

It was held by Markby and Jackson, JJ., in a case in 3 B. L. R., A. C., 312, (12, S. W. R. 217), that there was in Section 48 an implied exception to cases of oral agreements when possession had been delivered.

The decision proceeded upon the express ground that under the law of this country an oral agreement avails to give a good title in all cases, and that to hold that under no circumstances could an oral agreement prevail against a registered title would be tantamount to enacting a Statute of Frauds for India.

It is obvious that the reason for holding that there was an implied exception in Section 48 of oral agreements accompanied with possession did not apply to cases of documentary title.

The Legislature in enacting Act VIII of 1871 in Section 48 expressly excepted oral agreements accompanied or followed by possession. No similar exception as to the protective effect of possession was admitted into Section 49 or Section 50, and no such reason as existed for adding the exception in the case of oral agreements exists in the case of documentary titles. And it appears to me that we are not at liberty to treat these sections as if there were such an exception. There is a clear distinction between the two classes of cases. An oral agreement is unregistrable from the nature of it, and the Legislature may well have said, that as it was not prepared to go the length of compelling every agreement regarding property to be reduced to writing, oral agreements should be protected when accompanied by delivery of possession, which would in itself be evidence of the existence of the agreement.

There the Legislature might well stop, and decline to extend the same protection to documents which being registrable were not registered, and enact that when two documents existed regarding the same property the registered document should have a preference over the unregistered absolutely. It appears to have so enacted with regard to some kinds of documents only in Section 49 and Section 50 of Act VIII of 1871, and has since increased the classes of documents having priority in Act III of 1877.

It is to be observed that all the cases in which possession has been held to protect the possessor were decided under Act XX of 1866. The principal case is that in Vol. IX of *Bo. H. C.* p. 121, and in it, Westropp, C. J., expressly guards against any supposition that his decision would be the same as regards the effect of possession under Act VIII of 1871.

The conclusion I have arrived at agrees with that of my learned colleague. On the other points noticed, and in the order proposed by him I also concur, and the case will be remanded accordingly to the first Court for trial and decision.

All costs up to date exclusive of the stamp on the plaint will be borne by the defendant.

No. 19.

BUDHA SING,—(Plaintiff),—APPELLANT,

Versus

HIRA & MEGA,—(Defts.),—RESPONDENTS.

APPELLATE SIDE. {

Case No. 1428 of 1877.

(LINDSAY AND SMYTH, JJ.)

Limitation—Act IX of 1871, Schedule II, No. 95—Suit to recover value of cattle wrongfully and fraudulently received by depts.—Plaintiff sued to recover the value of cattle wrongfully and fraudulently received by defendants, representing themselves as agents of S., and appropriated by them to their own use. *Held* that the suit was one coming under No. 95 Schedule II Act IX of 1871, and that limitation began to run from the time when the alleged fraud became known to the plaintiff.

Regular Appeal from order of Commissioner Ambalah Division, dated 27th June 1877.

Kali Prosono Roy for Respondents.

The judgment of the Chief Court was delivered by

SMYTH, J.—The plaintiff's allegation is that the defendants, *21st Novr. 1877*, representing themselves to be Mussammat Santi's agents, received from him cattle in payment of a debt which he owed to Mussammat Santi, and that instead of giving the cattle to Santi they appropriated them to their own use, in consequence of which he was compelled by suit to pay the debt a second time.

The plaintiff further alleges that defendants were not authorized by Mussammat Santi to receive payment of the debt, and that in point of fact they acted fraudulently.

This suit is accordingly brought against defendants to recover the value of the cattle wrongfully and fraudulently received by them. The Commissioner held that the suit is barred by limitation, as a period exceeding three years had elapsed from the date when plaintiff gave the cattle to defendants before the suit was brought.

We consider that the case is one coming under Article No. 95 of Schedule II Act IX of 1871, and that limitation began to run from the time when the alleged fraud became known to the plaintiff. There is nothing on the record to show when the fraud became known to the plaintiff.

We must accept this appeal, and remand the case to the Commissioner for determination of that point after such further enquiry as he may consider necessary, and for fresh decision upon the question of limitation. If the case is held not to be barred by limitation the Commissioner should decide the case on the merits.

Stamp on this appeal to be refunded, other costs of this appeal to be costs in the cause.

No. 20.

MUSSUMMAT LAHORAN, SHEIKH NABBI BAKSH AND
MUSSUMMAT YAKINAN,—(Defendants),—APPELLANTS,

Versus

MADAR BAKSH,—(Plaintiff),—RESPONDENT.

} APPELLATE SIDE.

Case No. 1072 of 1877.

(LINDSAY AND SMYTH, JJ.)

Custody of wife—Agreement at marriage not to remove wife from parents' house—Public policy.—Plaintiff on his marriage executed an agreement binding himself never to take his wife away from her parents' house or town, under a penalty of freeing his wife from the marriage tie. Held that the agreement was contrary to public policy, and therefore, was no answer in a suit by the plaintiff for the custody of his wife.

Special Appeal from order of Commissioner and Superintendent of Rawalpindi, dated 19th June 1877.

The plaintiff in this case claimed the custody of his wife Mussummat Lahoran. The claim was resisted under the terms of an agreement (clause 7) executed by plaintiff on his marriage, by which he bound himself never to take his wife away from her parents' house or town, under penalty of freeing his wife from the marriage tie.

The first Court (Extra Assistant Commissioner Narain Sing) held the agreement invalid, and accordingly decreed the plaintiff's claim. The defendants appealed to the Commissioner, who gave judgment as follows:—

“ The appellant urges that according to Muhammadan law the 7th clause of the agreement of 23rd April 1876 makes the appellant a free woman and no longer the wife of the respondent, as in that he promised her freedom if he should break any of the conditions of the agreement for a year. She therefore is no longer now his wife. I hold that the agreement on which appellant relies is opposed to morality. It is a string of conditions extorted by the grasping mother of the girl from the man who wished to marry her, and it is not uncommon for women to sell their daughters to men of the khidmutgar class under agreements of this sort, binding them never to take their wives away from their parent's house or town, knowing full well that the man lives by service and must follow his employer to other stations. As soon as they do so they keep back the girl, and she makes money by prostitution, till the husband disgusted divorces her, and then she becomes the subject of another similar sale and agreement with another servant with similar results. These agreements are as opposed to Muhammadan law as they are to morality, and I uphold the decision of the lower Court and dismiss the appeal.”

From this order the defendants appealed to the Chief Court. The judgment of the Court was delivered by

5th Decr. 1877.

LINDSAY, J.—We agree with the Commissioner that it is against public policy to allow contracts of the nature of the one produced in this suit to have effect. The girl is the lawful wife of the plaintiff, and she has a child by him. She must live with her husband.

Appeal dismissed with costs.

JAGT
ATTORNEY
RAWALPINDI

No. 21.

JODH SING,—(Defendant),—APPELLANT,
Versus
 NATHA SING,—(Plaintiff),—RESPONDENT.

} APPELLATE SIDE.

Case No. 1445 of 1876.

(FITZPATRICK AND PLOWDEN, JJ.)

Joint khata.—Suit by sharer for recovery of particular lands.—Held that a sharer in a joint khata cannot maintain a suit against his co-sharer for the recovery of particular lands unless he can show either that he has been forcibly dispossessed of those lands, or that he made them over to his co-sharer under a contract by virtue of which he is entitled to have them restored to him.

Regular appeal from order of Additional Commissioner, Jullundur division, dated 16th June 1876.

The plaintiff claimed on the allegation that he had purchased $\frac{1}{4}$ th of a khata, No. 4 Terij, being the share of one Mada Sing, for Rs. 600, and that of this $\frac{1}{4}$ th share the defendant Jodh Sing had lately dispossessed him of $\frac{1}{3}$ rd = 4 *bigahs* 15 $\frac{1}{2}$ *biswas*. Defendant pleaded that the khata had been the joint property of himself, Hukam Sing, Mohar Sing and Kharak Sing.

The two latter held one-half, and of the other half defendant Jodh Sing held $\frac{2}{3}$ ds, and the son of Hukam Sing, *i. e.*, Mada Sing the seller, $\frac{1}{3}$ rd, the reason being that he, Jodh Sing, had paid Rs. 250 on account of debts due by Mada Sing, and had therefore retained in his possession since Mada Sing's childhood $\frac{1}{3}$ rd of Mada Sing's ancestral share. In this way he, Jodh Sing, said he had adverse possession of the said $\frac{1}{3}$ rd, and Mada Sing was therefore only in a position to sell $\frac{2}{3}$ ds, and not the whole of what would by ancestral right fall to him. Mada Sing was defendant, and corroborated plaintiff's statement, and maintained that he had had possession of his whole share and had sold it.

The issues tried were—

Has defendant had possession of $\frac{1}{3}$ rd of Mada Sing's ancestral share on account of a debt of Rs. 250 paid by him many years ago?

2. Of what land has Mada Sing been in possession from the first, $\frac{2}{3}$ ds of the share he should get by ancestral right or the whole?

3. Can plaintiff now get the land he sues for?

The first Court on the above issues found—

1st. That there was certainly a family arrangement under which Jodh Sing had always held more than his share.

2nd. That for upwards of 12 years past Mada Sing had only field 9 *bigahs* and no more.

Srd. That plaintiff could not now, as Mada Sing's representative, get more land than 9 bigahs, as defendant had had long adverse possession.

The first Court accordingly dismissed the suit.

The Additional Commissioner, on appeal, remanded the case for further enquiry by the following order :—

“The point for decision is whether Mada Sing is entitled to his half of the land recorded as the joint property on equal terms of Jodh Sing and Hukam Sing, father of Mada Sing. If he is, then of course the sale to plaintiff gives plaintiff the right to demand a full half, but if Jodh Sing's plea that he has all along held $\frac{2}{3}$ ds to Mada Sing's $\frac{1}{3}$ rd, by reason of his having paid a sum of Rs. 250 due by Mada Sing, is proved, then the only question is whether plaintiff can claim to obtain the land on payment of this sum, or whether it must be held to have been absolutely sold to Jodh Sing and so lost to Mada Sing for ever.

This point of the payment of this sum of money on account of Mada Sing ought to be susceptible of proof. Defendant says it can be proved by the entries in the books of Kahna and Dasoundhi ; these should be examined. In fact the matter does not seem to have received full attention ; the presumption raised by the entry in the Settlement records of the equal interest of Jodh Sing and Hukam Sing, father of Mada Sing, must be rebutted by some evidence more definite and dependable than the random oral evidence in the file. The possession by Jodh Sing of more land than Mada Sing is evidence of the required nature, so far as it goes, but it is not conclusive.

I return the case for further evidence on this issue :—

Did Jodh Sing pay the sum of Rs. 250 (or more or less) on account of Mada Sing ; and (2) if so, has he held $\frac{1}{3}$ rd of Mada Sing's land ever since, as sold to him for this sum, or should it be regarded as mortgaged ; and (3) if the latter, on what terms is it now fairly redeemable.”

On receipt of a return to the above order of remand, the Additional Commissioner gave judgment as follows :—

“The return to the Court's order of the 4th April has been made with the result that Jodh Sing cannot prove to the Lower Court's satisfaction that he paid Rs. 200 or any other sum on Mada Sing's account,—so that the title of Jodh Sing to hold a portion of Mada Sing's land as practically mortgaged or sold to him for money paid on his behalf is not made out, though the Court seems to think it probable that some expenditure may have been incurred by Jodh Sing on behalf of Mada Sing ; but as a set-off it must be remembered that Jodh Sing has at any rate had the entire produce for many years.

Under these circumstances the khata being joint and the shares recorded as equal, and admitted to be so in fact, and the special reason which defendant alleged as giving him a title to hold $\frac{2}{3}$ ds instead of $\frac{1}{2}$, to which he is by right entitled, not being established, it follows that Mada Sing is entitled to his full half,

and that plaintiff, who stands in his place as the purchaser of his estate, is entitled to his decree against the defendant.

The appeal is therefore accepted and decreed with costs."

From this order the defendant appealed to the Chief Court. The following judgments were delivered :—

FITZPATRICK, J.—It has been found by the Additional Commissioner in this case—

1st. That the holding in which the land in dispute is included has never been divided, but is still the common property of Natha Sing, plaintiff, the purchaser of Mada Sing's share, and Jodh Sing (defendant).

2ndly. That Natha Sing has failed to prove his allegation that he got possession of that land after his purchase, and was ejected by Jodh Sing; that, on the contrary, Jodh Sing is shewn to have been in possession from a time long anterior to Natha Sing's purchase.

3rdly. That Jodh Sing has failed to prove his allegation that the land was made over to him by Mada Sing in pursuance of a sale or mortgage.

I see no reason to differ from the Commissioner on any of these points of fact, and accepting the Commissioner's findings on them the case is reduced to that of one sharer in a joint khata suing to recover from his co-sharer specific lands of that khata simply on the ground that the lands held by him (plaintiff) fall short of his share by the extent of the lands claimed; that he (plaintiff) some years ago had possession of the lands claimed, and that these lands have in some way, which does not appear, passed into the possession of the defendant.

It is quite clear that such a suit cannot be maintained. No sharer in a joint khata can maintain a suit against his co-sharer for the recovery of particular lands, unless he can show either that the defendant has forcibly dispossessed him of those lands, or else that he (plaintiff) made those lands over to the defendant under some contract by virtue of which he is now entitled to have them restored to him.

If his case is merely that he once had separate possession of his full share of the lands, and that in the course of the changes which are constantly taking place in joint khatas, he has now less and the defendant more than his share, his proper course is not to sue to recover any particular lands that may have passed out of his possession into that of the defendant, but to sue for a partition of the khata.

Accordingly, as the plaintiff has sued for possession of particular lands instead of for partition, his suit strictly speaking ought to be dismissed: but as all the facts of the case have been fully investigated, and we are now in a position to decide finally on the merits of the dispute, I think it would be a pity to put the parties to the trouble and expense of a fresh suit.

I would accordingly, as I think we may fairly do, treat the present suit as one by the plaintiff for a declaration of his right, to

have a fourth share of the khata divided off, and treat the defendant's plea as one to the effect that $\frac{2}{3}$ ds of that fourth share has been sold or mortgaged to him; and viewing the matter in this light, I would decide that the defendant has failed to establish his plea, and declare that the plaintiff is absolutely entitled to have his full fourth share divided off.

As the plaintiff brought his suit in wrong form and thereby added to the difficulty and complication of the case, I would make no order as to costs.

6th Novr. 1877.

FLOWDEN, J.—I concur in the proposed order. Treating this as a suit for a declaration by the purchaser that he had purchased the share of Mada Sing, and as such purchaser was entitled to acquire possession of half of the joint khata held by Mada Sing and Jodh Sing, it was incumbent, under the admitted facts of the case, upon Jodh Sing to prove clearly and satisfactorily that he was in possession of more than his ancestral share of the joint property, under an arrangement which was binding upon Mada Sing, and which transferred to him a fractional share of his interest. Now the arrangement, whatever it may have been, a point which is not satisfactorily cleared up by Jodh Sing, was one entered into during the minority of Mada, a circumstance which has not received, I think, all the consideration it deserved in the decision of this case. Jodh Sing not having discharged himself of the burden which lay upon him, I think the khata may still be held to be undivided, and to have been owned prior to the sale by Mada Sing in equal shares between him and Jodh Sing, and that Madha's share passed free from all incumbrances to the purchaser.

The statement made by Mada in 1869, tends to show that he had not assented to any partition by which Jodh Sing was entitled to hold permanently more than his own share of the joint land, and this is in accordance with the conclusions arrived at by the Commissioner.

No. 22.

APPELLATE SIDE. {	RANJHA AND OTHERS,—(Defendants),—APPELLANTS,
	<i>Versus</i>
	MUSSUMMAT RAJJI,—(Plaintiff),—RESPONDENT.

Case No. 522 of 1877.

(FITZPATRICK AND FLOWDEN, JJ.)

Jurisdiction—Civil Court—Act XXXIII of 1871, Section 65, Clause 2—Partition—Right of widow to—Joint Estate.—Plaintiff, a widow, on the death of B., her husband's father, in 1872, was recorded as owner of a fifth share in the Khata owned by B. and since then had received from defendants, the widow and sons of B. who were recorded as owners of the remaining four shares, a fifth share of the produce of the Khata. Defendants having ceased to give plaintiff her fifth share of the produce, she instituted a suit for partition which was contested by the defendants.

Held that as the right to partition was contested. the suit was not barred from the cognizance of the Civil Courts by Clause 2 Section 65 of Act XXXIII of 1871.

Held further, that plaintiff was entitled to partition.

Per FITZPATRICK, J.—Because there had been a separation in interest and right between the parties, notwithstanding that there had been no actual division, and the joint family relation between them had thus been put an end to.

Per PLOWDEN, J.—Because the plaintiff was equitably entitled to such relief, as being best calculated to secure to her rights which the defendants omitted to recognize in practice.

Special appeal from order of Commissioner, Lahore, dated 20th March 1877.

Kali Prosono Roy for appellants.

Morton for respondent.

The facts are sufficiently stated in the following judgments:—

FITZPATRICK, J.—It is admitted on all hands in this case that after the death of Buggoo, the plaintiff was recorded as owner of a one-fifth share of the Khata in dispute, and that since then she has been receiving from the defendants, who were recorded as owners of the remaining four shares, a fifth portion of the produce. I think in the absence of anything to suggest the contrary, the inference from this is that as in the cases of *Appovier versus Rama Subba Aiyar* (11 Mo. I. A. 75) and *Raja Suraneni Venkata v. Raja Suraneni Lakshmi* (3 B. L. R. P. C. 41) “a separation in interest and right,” though without “a *de facto* actual division of the subject matter,” has taken place between the parties, that the joint family relation between them has been put an end to, and that the plaintiff is in a position similar to that of the widow in the case of *Ram Joshi v. Lakshmi Bai*, (1 Bo. H. C. rep. 189). The widow in that case was held entitled to claim an actual division of the land, and I cannot see any ground for a distinction between it and the present case. There is no doubt this difference, that in that case the husband of the widow had succeeded to his share, and the separation of interest had taken place in his lifetime, whereas the husband of the plaintiff in the present case having predeceased his father, never so succeeded, and it was only by the separation of interest which took place subsequently to the death of the father, that the plaintiff attained her present position with reference to the property, but that position, now that she has attained it, being precisely similar to that of the widow in the other case, I do not see how, if the Hindoo law is to be applied, we can deny to her the right to claim an actual division which was conceded to the widow there.

9th Novr. 1877.

As regards the suggestion that the plaintiff's claim, though good according to the Hindoo law, may be opposed to local custom, I can find nothing in the record of this case or in previous decisions of this Court, to indicate the existence of any such custom. The case No. 50 of the *Punjab Record* of 1870, relied on by the defendants in the first court, was like the previous case No. 28

of the same year, a case in which the property was joint undivided property in respect of which, as far as appears, no separation of interest like that made in the present case had ever taken place, and from a still earlier case of the same class, No. 93 of the *Punjab Record* for 1869, it would seem to have been held that where there has been "evidence of enjoyment by the widow with the acquiescence of her opponents, of the share claimed," that is, as I understand, when there has been a separation in interest as distinguished from an actual division of the subject matter, a right on the part of the widow to claim partition would be recognized.

I therefore agree with the courts below in holding that the plaintiff in this case is entitled to claim partition.

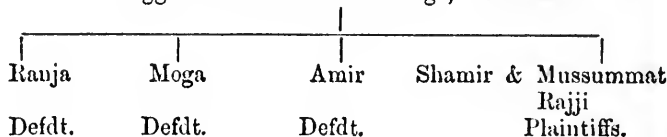
As regards the objection that this suit is barred by clause 2 of Section 65 of the Punjab Land Revenue Act, 1871, because it does not impeach the correctness of any entry in the Settlement record, I think it enough to refer to any judgment (concurrent in by Mr. Justice Lindsay) in the case reported as No. 97 of the *Punjab Record* for 1876.

I would dismiss the appeal with costs.

LOWDEN, J.—In this case the plaintiff Mussummat Rajji sues for a partition of a joint khata containing 23 ghomaos of land.

This khata first stood in the name of Buggoo, the family tree standing thus :—

Buggoo and Mussummat Bhago, Defendant.



Shamir died 10 years ago, leaving the plaintiff his widow.

Before Buggoo's death the whole property stood in his name. On his death in 1872, mutation of names took place: the sons (defendants) being shown as entitled to three shares, and Buggoo's widow and Shamir's widow to one share each.

The proceeding seems to have been merely the ordinary routine proceeding on the death of a recorded proprietor.

The plaintiff states that she received one-fifth share of the produce for some years from defendants, the cultivation continuing to be joint, and she now claims a separation of one-fifth share of the holding, as the male members of the family have refused or neglected to give her her share of the produce.

The defendants pleaded that by custom the widow is not entitled to partition of her share, the khata being joint and undivided. The first court refused partition, but awarded the widow a fixed maintenance of Rs. 24 as equivalent to her share, or one-fifth of the produce of the joint khata.

The Appellate courts have decreed partition. The Judicial Assistant held that "the courts cannot compel Mussummat Rajji to continue joint with the defendants. It is fully conceded that she is entitled to one-fifth share of the land as her husband's heir, and she may, if she so choose, have separate enjoyment of her share."

The Commissioner, pointing out that the defendants drove plaintiff into court by refusing to give plaintiff one-fifth share of the produce, states—"Mussummat Rajji is recorded as proprietor of one share out of five in the joint estate, and the defendants have no right to prevent her separate enjoyment of it."

The defendants appeal, and a preliminary objection is taken that this suit is not cognizable by the Civil courts, but only by the Revenue courts, under clause 2, Section 65, of Act XXXIII of 1871.

I think this objection cannot prevail. It is true that the extent of the share to which in a partition the plaintiff would be entitled is not contested, but the right to partition is. It is not shown that there is any entry in the record of rights entitling a widow to partition of the joint family estate after her husband's death, and if there be such an entry it is clearly contested by the defendants.

The orders of the Lower appellate courts appear to me to be maintainable, though not upon the exact grounds given by them for their conclusions.

The parties are Mahomedans, but seem to follow a custom which resembles the Hindu law. Under that law, according to the Mitakshara school, if the family was a divided family, or her husband had separated before his death, and his share had been ascertained though not actually set apart in *specie*, the widow would have been competent to enforce division of the share (1 Bo. H. C. p. 189, and *Punjab Record*, 1876, No. 100).

If the family was a joint family at the time of the plaintiff's husband's death, the widow would become entitled to maintenance and nothing more.

But as the widow of a deceased coparcener, she would not be entitled to demand partition, nor is she a coparcener in the estate (1 Norton's L. C. p. 296).

Even if the coparceners agreed to divide, she would only be entitled to maintenance, and not a share.

By custom in the Punjab, a widow frequently succeeds to her husband's share of a joint holding (Customary Law p. 52). But there are many cases (cited at p. 56 and p. 58) to show that she is not regarded as "full malik," and is not entitled to compel partition. According therefore to the Hindu law, or to the custom as deduced from the cases referred to above, the widow is not *prima facie* entitled to partition. The reason of the rule appears to be the same, whether law or custom furnishes the rule, namely, that the widow is not a full malik, or on a complete level with the male coparceners.

In the present case there is no evidence that the widow has a higher right than usually is accorded by custom to the

class to which she belongs, and all that can in my opinion be inferred from the entry in the revenue papers is, that she has an interest extending to one-fifth in the joint holding.

No doubt that entry is evidence that the coparceners agreed upon the death of Bhuggoo to hold their shares in future in severalty, awarding to Bhuggoo's widow and to the plaintiff, Shamir's widow, a share equal in each case to a son's. But it is only a piece of evidence. The facts that the cultivation has continued joint, that the proceeding in which the shares were separately entered was merely formal, that neither party treats it unequivocally as amounting to or entailing division of the joint family, seems to me to show that notwithstanding the undisputed fact that the plaintiff enjoyed a fifth share of the income for a time, there has never been that intention to become separate, which is the essence of the separation of the members of a joint family.

The plaintiff's real grievance, as I understand, is that the male coparceners neglect or refuse to give her the income to which she deems herself entitled, because she is entered in the revenue records as having an interest in the joint khata to the extent of one-fifth, as the widow of her husband.

If it be held that upon the facts the defendants, the male coparceners, have placed the widow in the same position virtually as if during her husband's lifetime he and they had agreed to divide the joint estate, then I entirely concur with my learned colleague, who as I understand takes this view of the facts, that she is entitled to the partition sued for.

But even upon the other view, namely that the family being joint at the time of Bhuggoo's death and of Shamir's the plaintiff's husband, still continues to be so, and that the estate is still jointly held, the widow seems to me under the circumstances of this case entitled to the decree which the Commissioner has given her upon one of the grounds specified by him, namely, that the defendants do not give her the share of the produce representing her recorded interest.

If the defendants were discharging their obligations towards the widow, I think her suit would properly be dismissed, because she has not upon my view of the facts and law an interest which gives her the right to compel partition at her pleasure.

But this is not the case, and the widow is in my opinion equitably entitled under the circumstances to the particular relief which she seeks, as being the relief best calculated to secure to her rights which the defendants omit to recognise in practice. The granting this relief is a matter which I take to be not one of right, but within the discretion of the court, as appertaining rather to the remedy which the court will apply to the mode of enjoyment rather than to the strict substantive right of the plaintiff. I think it is quite open to the court to say to the defendants that they have failed in their duty to the widow, and that they must therefore submit to a separation of a portion of the estate which will provide her with proper maintenance and put her beyond reach of their power to injure in future, the extent of that portion

being in this instance determined by the revenue records. She will of course have no larger estate or interest in this specific portion than she would have had upon a partition, no larger power of encumbering and alienating it effectually during her life or after her death; she will simply take the ordinary widow's interest, and the property will revert in the usual course upon her death, the reversioners having it in their power to prevent her from dealing with it improperly.

There is nothing inconsistent to my mind with the Hindu law or custom in holding that when there is a right to maintenance out of the ancestral estate, and a continuous omission on the part of those actually managing it to discharge their obligations, a portion of the estate may be assigned to the widow in severalty, upon the ordinary widow's tenure, to secure that maintenance to her, and render her in that respect independent of those who neglect to fulfil their duty towards her. To affirm this is not to affirm that she has a right to partition. If she had that right the courts would be bound to enforce it upon her demand, whereas upon the view I entertain, it rests in the judicial discretion of the courts, having regard to the circumstances under which their aid is sought.

Authorities for holding that a portion of the property may be set aside, and the interest or proceeds thereof assigned to the widow for her maintenance, when in strict right she is only entitled to maintenance, may be found in Norton's leading cases p. 45. A closely analogous case is that in which a widow being entitled to maintenance only in the shape of "food and raiment" residing with the relations of her husband, may be entitled to a decree for a money allowance, when circumstances render it just and equitable to make such a decree.

The true source of the power to grant the particular kind of relief in such cases, and in cases like the present, seems to me to be not the Hindu law or custom but justice, equity, and good conscience, and one of the chief occasions for the exercise of this power is when it is found that there is a grave dereliction of duty upon the part of those whose duty it is to maintain a widow, who have her practically at their mercy and abuse their power to her injury. It would be mere mockery, a denial of justice and perpetuation of injustice towards a widow, circumstanced as the plaintiff is with her past experience, to tell her that her only remedy is to sue each harvest for her fifth share of the produce, or its value, until such time as her husband's relations learn by bitter and costly experience to give her her due without compulsion.

The law does not oblige the court to say this, but as I understand it, enables the court to place a widow so situated in a position of security, subject of course to her not exceeding her own rights to the detriment of those who will enjoy the inheritance hereafter, and as the circumstances of this case, to my mind, justify the court in placing the plaintiff in this position of security, giving her separate possession of a portion of the estate from which she is undoubtedly entitled to be maintained, I concur with my learned colleague in upholding the Commissioner's order.

No. 23.

APPELLATE SIDE. {

MUSSUMMAT KHEM KOUR,—(Plaintiff),—APPELLANT,

Versus

GUJAR MAL,—(Defendant),—RESPONDENT.

Case No. 1095 of 1877.

(LINDSAY AND SMYTH, JJ.)

Act XL of 1858, Section 7—Certificate under—Discretion of Court to grant.—Held that Section 7, Act XL of 1858, does not render the grant of a certificate for the administration of the property of a minor to a near relative compulsory. The words of the Section are not imperative, and it is left to the Court to grant a certificate or not, as it thinks proper under the circumstances of the particular case.

Special appeal from order of Additional Commissioner, Jullundur, dated 24th April 1877.

Kali Prosono Roy for appellant.

Rattigan for respondent.

15th Decr. 1877.

LINDSAY, J.—It is contended that the word “may” in section 7 Act 40 1858, means that the court may select between the persons referred to in the section, but that it must grant a certificate to some one of them.

I am of opinion that the terms of Section 7 Act 40 1858 do not compel the Court to grant a certificate to a near relative. It is optional in such a case with the Court to grant or refuse to grant the certificate. Appeal dismissed with costs, Rs. 16 pleader's fee.

SMYTH, J,—I concur. I do not think it can have been the intention of the Legislature to compel the Court to grant a certificate in all cases whatever may be the amount of the property, simply because some relative of the minor comes into court and asks for a certificate, or asks the court to appoint a fit person to take charge of the property.

The words of the section are not imperative, and it seems to me to be left to the discretion of the Court to grant a certificate or not, as it thinks proper, under the particular circumstances of the case.

No. 24.

APPELLATE SIDE. {

HEBA AND 3 OTHERS,—(Plaintiffs),—APPELLANTS,

Versus

RAM SING,—(vender),—AND MUNSHI RAM,—(purchaser),—(Defendants), RESPONDENTS.

Case No. 422 of 1877.

(LINDSAY AND SMYTH, JJ.)

Village Site—Abadi—Sale of Vacant site occupied by proprietor for many years—Consent of Co-sharers—Custom.—Where the abadi was recorded in the wajib-ul-arz as the common property of the village proprietors, held (no special custom being proved), that the fact of one of the proprietors having held a vacant site in the abadi gave him no right to sell it to one who was not a member of the village community, without the consent of the co-sharers.

Regular appeal from order of Commissioner and Superintendent Umballa Division, dated 23rd December 1876.

Suraj Bal, Pandit, for respondents.

This case was remanded by Fitzpatrick and Smyth, JJ., on 23rd June 1877, for evidence to be taken on the question of custom.

The Commissioner on 4th December 1877 made the following return :—

The report of the Ex. Asstt. Commissioner is to the effect that there is no evidence of any custom as to the right of a villager to sell to a person not belonging to the proprietary body in the village in dispute, but that in a neighbouring village such right to sell was upheld by the Civil Court.

I find in the settlement record the village site is declared to be held in common in proportion to the amount of holdings, i. e., of khewat.

Where this is the case the village site is liable to division, allowance being made for possession as far as possible, but the holding of a person possessing more than his share would be reduced.

Under these circumstances I cannot think that individual sharers can have a right of sale till a division is made, unless with the consent of the co-sharers, and there would certainly be a right of pre-emption even after division, but such has not been urged in this case.

In my opinion a decree should be given for plaintiffs, and the sale rescinded on the above grounds.

On receipt of the above return the appeal came on for hearing before Lindsay and Smyth, JJ.

The judgment of the Court was delivered by

SMYTH, J.—The return made to the order of this Court of the 23rd June 1877 is to the effect that there is no special custom one way or the other. 19th Decr. 1877.

The Commissioner, however, observes that the abadi is recorded in the wajib-ul-arz as the common property of the village proprietors. That also is in accordance with the general rule applicable to proprietary right in the *abadi* in other agricultural villages. That being so, we do not think that the mere fact that one of the proprietors has held a vacant site in the abadi for many years gives him a right to sell it to one who is not a member of the village community without the consent of the co-sharers. It was held in

case No. 25 of *Punjab Record* for 1875 that the consent of a single proprietor out of a number of joint proprietors does not create a right which otherwise is not vested in the vendor.

We accordingly hold that Ram Sing was not entitled to sell the site to Munshi Ram, and we accept this appeal, and restore the decree of the first Court, with costs throughout.

No. 25.

APPELLATE SIDE. { FATTEH AND 5 OTHERS,—(Defendants),—APPELLANTS,
Versus
HIMMAT,—(Plaintiff),—RESPONDENT.

Case No. 1135 of 1877.

(LINDSAY AND SMYTH, JJ.)

Limitation—Act IX of 1871, Section 27—Easement—Right of way.—In a suit for an easement or right of way, the question for decision is whether the way has been openly and peaceably used and as of right without interruption for a period of 20 years ending within two years next before the institution of the suit. (Section 27 Act IX of 1871). Where it was found that the way was not used for more than ten years at most, held that the plaintiff's claim to a right of way failed.

Special appeal from the order of the Judicial Assistant Rawalpindi, dated 5th June 1877.

22nd Decr. 1877.

LINDSAY, J.—The plaintiff had to prove that he, as of right, had used the path in question for 20 years peaceably and openly as an easement, to within two years of his suit.

It is clear from his own showing that the plaintiff has not acquired the easement he claims as an absolute and indefeasible right.

The former case in no way bears upon this one. The plaintiff's claim is dismissed, and this appeal decreed with costs.

SMYTH, J.—The Lower Courts entirely misunderstood the real question involved in this case.

The first Court considered that as the right of way had existed for three years the plaintiff was entitled to keep it open.

This Judicial Assistant's judgment is unintelligible, as he considered that the suit was barred by limitation under article 31 schedule II Act IX 1871, and yet he upheld the Extra Assistant Commissioner's order by which a decree was given for plaintiff.

The suit is for an easement or right of way over defendant's land, and the real question is whether plaintiff has used the way openly and peaceably and as of right without interruption for a period of 20 years ending within 2 years next before the institution of the suit (Section 27 Act IX of 1871). It is clear, as found

by the first Court, that the way was not used for more than 10 years at most. Plaintiff's suit therefore fails, and must be dismissed with costs.

No. 26.

DULLA,—(Decree holder),—(Plaintiff),—APPELLANT,	} APPELLATE SIDE.
<i>Versus</i>	
KARM AND SHAH ALAM,—(Judgt. debtors),—(Defendants),—RESPONDENTS.	

Case No. 1232 of 1877.

(LINDSAY AND SMYTH, JJ.)

Civil Procedure Code (Act VIII of 1859) Section 206—Execution of decree—Payments in satisfaction of, made out of Court, but not certified to the Court.—D. obtained a decree against K and S. A. for possession of certain mortgaged land, subject to the condition that K and S. A. were to continue in cultivation thereof for three years, paying D. the proprietors' share of the produce, out of which D. was to pay the Government revenue, and apply the surplus (if any) to paying off the principal debt, and in the event of the principal debt not being paid off, D was to obtain cultivating possession. At the end of three years, D applied for possession under the decree, alleging non-receipt of any payments under it, while K and S. A. alleged payments in full satisfaction of the principal debt. *Held* that the Court executing the decree was precluded by Section 206 Act VIII of 1859 from recognizing the payments alleged to have been made out of Court, and which were not certified to the Court.

Seemle, that even if it was intended that the payments under the decree obtained by D. should be made out of Court, K. and S. A. were not relieved from the duty of seeing that such payments were certified to the Court by D.

Regular appeal from order of Commissioner and Superintendent Rawalpindi Division, dated 20th July 1877.

Rivaz for appellant.

The facts are sufficiently stated in the following judgment delivered by

SMYTH, J.—Mr. Rivaz urges that the Commissioner has erred *23rd Jany. 1878.* in law in holding that the alleged payments by defendants could be recognised though not made through or certified to the Court.

We think that this objection must prevail. Sham Lall's decree was one giving plaintiff possession of the mortgaged land subject to the stipulations of the mortgage deed. By the mortgage deed the mortgagors were to continue to cultivate the land for three years, and to pay to the mortgagee the proprietors' share of the produce, out of which the mortgagee was to pay the Government revenue and apply the surplus (if any) to paying off the principal sum for which the land was mortgaged. If at the end of the three years the mortgage money was not paid off, the mortgagee was to be put into cultivating possession of the land.

At the end of the three years the mortgagee applied to the Court to be put in possession under the decree, alleging that he received no payments under the decree. The mortgagor replied that he had paid off the mortgage money in full.

The question is whether in execution of decree the Court could recognise the payments alleged to have been made out of Court and which were not certified to the Court. Section 206 Act VIII of 1859 expressly provides that no adjustment of a decree in part or in whole shall be recognised by the Court unless made through the Court or certified to the Court by the decree-holder. In the present case the payments were not certified to the Court, although they might have been. The Commissioner refused to allow weight to this objection, because the Extra Assistant Commissioner, Sham Lall, in June 1873 expressly stated that the defendant was to make payments out of Court, *i. e.*, in his own village, from the produce of the land. I do not find any express statement to that effect, though no doubt it may be gathered from the terms of Sham Lall's decree that it was intended that the payments should be made out of Court. But that did not relieve the judgment-debtor from the duty of seeing that they were certified to the Court by the decree-holder.

I consider therefore that the Court executing the decree cannot enquire into the alleged payments, but must execute the decree as if no such payments had been made. If defendants have really made payments which the decree-holder refuses to acknowledge, it is of course open to them to bring a separate suit to recover them back, and the question of whether they have or have not made such payments would then be enquired into and decided.

I think this appeal must be accepted, and the case remanded to the first Court to execute the decree as if no payments (except that admitted by the decree-holder) had been made under Sham Lall's decree. The appellant is entitled to costs, Rs. 16, of this appeal.

LINDSAY, J.—Concurred.

No. 27.

APPELLATE SIDE. {	BAHA-UD-DIN,	}	—(Defendant),—APPELLANT,
	(JUDGMENT-DEBTOR)		
	<i>Versus</i>		
	MOTI LAL,	}	—(Plaintiff),—RESPONDENT.
(DECREE-HOLDER)			

Case No. 1281 of 1877.

(LINDSAY AND PLOWDEN, JJ.)

Pensions Act XXIII of 1871, Section 11—Pension—Assignment of land revenue for benefit of shrine.—The revenue of certain land was

assigned to the custodian of a shrine for the benefit thereof. *Held*, that such assignment of land revenue was not a pension within the meaning of Section 11 of the Pensions Act XXIII of 1871.

Appeal from order of Commissioner and Superintendent Delhi Division, dated 18th June 1877.

Bates for Appellant.

The question for decision in this case was whether the assignment of the revenue of mouzah Moharban made by Government for the maintenance of the shrine of Dargahs Makhdum Nurjahan Sahib and Makhdum Shah Alam Sahib was a pension within the meaning of that word as used in Section 11 of the Pensions Act 1871. The Court of first instance held that it was.

The Commissioner on appeal, after describing the assignment as above set forth, gave judgment as follows :—

“ This same question came before me in April last in the case *Piara Lal v. Kamr-ud-din Khan*. noted in the margin, and I then decided that the word pension in Section 11 of the Pensions Act does not include assignments of revenue. Nothing has been urged before me in this case that tends to throw a doubt on the correctness of the decision previously arrived at on this question. The word pension is nowhere defined in the Act, but the words grant of money or land revenue are defined in Section 3. And in Section 4 grants of money or land revenue are distinguished from pensions. In Section 11 the word pension only is used, and it is so used as to show, I think, that only payments of money from the treasury are intended to be included in this term. The pensions referred to are political pensions, service pensions and compassionate allowances, and these are the three classes into which pensions paid from the treasury are divided. It would appear from this that grants of land revenue were intentionally omitted from Section 11.

On these grounds I accept the appeal, and annul the decision of the lower Court with costs.

It is urged by the respondent's pleader that the proceeds of the village having been assigned for the support of the shrines named above, they, the proceeds, are not the property of the judgment-debtor, and cannot therefore be attached by his creditor. This is a point which was not decided by the lower Court, and cannot therefore be raised in appeal.”

From this order the judgment-debtor appealed to the Chief Court.

Bates, for appellant, contended that the money was not liable to attachment, and that the Commissioner was wrong in refusing to consider and determine the objection raised before him.

The following judgments were delivered :—

LINDSAY, J.—A grant of money was allowed by the state for a shrine. Subsequently the revenue of certain land was assigned to *4th Feby. 1878.*

the custodian of the shrine for the benefit of the shrine. We do not consider this grant of money to be a pension. It is a grant of land revenue made by the state for the benefit of the shrine, and to be properly spent by its custodian. The question to be determined is whether this grant can be attached in execution of a decree against the judgment-debtor in this case. This question was not raised, nor considered by the Courts.

On the ground that the money paid was a compassionate allowance, and consequently a question beyond the jurisdiction of the Civil Court, the first Court refused the prayer of the judgment-creditor. The Commissioner, on appeal, held the grant not to be a pension and dismissed the appeal, but with regard to the question raised by Counsel for the judgment-debtor, *viz*:—whether “the proceeds of the village,” by which expression we understand the Commissioner to mean the assigned revenue, can be attached by the judgment-creditor, the Commissioner refused to give an opinion as it was not raised in the first Court.

We remand this case under Section 351 Act VIII of 1859 to the first Court for the consideration and determination of the point raised.

Costs will be costs in the suit, and the value of the stamp for this appeal will be refunded.

FLOWDEN, J.—I concur in holding that the assignment of land revenue described in the Commissioner’s judgment is not a pension within the meaning of Section 11 of the Pensions Act of 1871, and in the order of remand to the first Court.

No. 28.

APPELLATE SIDE. {	DYAL SING & SUNDER SING—(Defdts.)—APPELLANTS,
	<i>Versus</i>
	MANGAL MAL,—(Plaintiff),—RESPONDENT.

Case No. 1117 of 1877.

(LINDSAY AND SMYTH, JJ.)

Act XVIII of 1869, Section 18—Unstamped document, admission of in evidence by first Court—Power of Appellate Court to interfere—Act IX of 1871, Section 20—Acknowledgment—Items barred by limitation.—A Court of first instance admitted in evidence an unstamped acknowledgment of a debt, which embraced items more than 3 years old, and consequently barred by limitation. *Held* that the Appellate Court was precluded from taking up the question whether the acknowledgment had, under the provisions of Act XVIII of 1869, been wrongly admitted in evidence as unstamped.

Held further, that the Appellate Court was bound to enquire and decide whether only items not then barred by limitation were comprised in the balance struck which was acknowledged by defendants to be due.

A written acknowledgment is only effectual under Section 20 Act IX of 1871 in giving a fresh period of limitation for a debt, when it is signed before the expiration of the period prescribed for the debt.

Special appeal from order of Commissioner and Superintendent Umballa Division, dated 4th May 1877.

Bates for Appellants.

Gouldsbury for Respondent.

The facts of this case are fully stated in the following judgment which was delivered by

SMYTH, J.—The defendant, Dyal Sing, is the father of the defendant Sunder, and they carried on their dealings jointly. They had a running account with plaintiff, and it is found by both the lower Courts that a balance of Rs 851-12 was struck on this account on Asar Sudi 4th Sambat 1931, and signed by the defendant Sunder. The written statement of the balance so signed contains the words “baki leua raha,” and though not a new contract, it amounts to an acknowledgment in writing that the balance was then due. The first Court holding the balance to have been duly struck and signed, gave plaintiff a decree upon it. The defendants appealed to the Commissioner on the grounds:—(1) that the balance had been wrongly admitted in evidence inasmuch as it was unstamped; and (2) that many of the items embraced in it were of more than three years’ standing at the time the balance was struck.

6th Feby. 1878.

With regard to the first ground the Commissioner held that he was precluded by the ruling of this Court in Case No. 79 of *Punjab Record* for 1870, from taking up the question whether the document had, under the provisions of the Stamp Act, been wrongly admitted in evidence as unstamped. And as regards the second ground the Commissioner refused to consider it because it was not urged in the memorandum of appeal.

In special appeal to this Court the defendants urge that the Commissioner erred—(1) in holding that he was bound to admit the unstamped balance of account as evidence; and (2) in refusing to consider whether any of the items comprised in the balance were of longer standing than three years at the time the balance was struck.

As regards the first point the decisions of the High Courts are conflicting.

In a case reported at page 297 of 3 Madras Reports, the High Court of Madras held that where the objection is taken for the first time in special appeal that a document which, according to Act X of 1862, ought to have been stamped, has been admitted by both the lower Courts unstamped, the High Court is bound to take notice of the objection (although not one of the grounds set forth in the petition of appeal) and to require payment of the stamp duty and penalty, or to reject the document. The Court remarked:—

“The Stamp Act (X of 1862) prohibits an unstamped document from being received in evidence or acted upon in any civil proceeding in a Court of justice, except on payment of the proper amount of stamp duty and penalty. * * *

“ We think it imperative on this Court hearing the suit on “ appeal, as well as on the Court of first instance, to give effect to “ the provisions of the Act, though the objection be for the first “ time pointed out on the hearing of the appeal.”

That decision was given in 1867. In an earlier case in 1866, the High Court N. W. P. held in regular appeal that an unstamped document having been received in evidence by the lower Court, the objection of the want of stamp is unsustainable in the Appellate Court, as it does not affect the merits of the case or the jurisdiction of the lower Court (1 Agra Rep. 63).

In a case in 1869, reported at page 520 of 11 Suth. W. R. the Calcutta High Court held similarly. Sir Barnes Peacock in delivering his judgment remarked :—“ I am of opinion that with “ regard to the want of stamp it is not a ground for reversing the “ decision, because I think that the error, if any, of receiving the “ document without a stamp did not affect the merits of the case “ or the jurisdiction of the Court, although it might have affected “ the Government revenue.”

Then after referring to cases where it had been similarly held by the late Sudder Court, and stating his belief that there were also cases in which the High Court had held to the same effect, the Chief Justice added : “ But whether there are decisions of “ the High Court on this point or not, the decisions which I have “ already cited are so consistent with justice that I should feel “ myself bound to follow them.”

This case was followed in a case reported at page 6 of 16 S. W. R., and there are other decisions of the Calcutta High Court to the same effect.

The rulings of the Chief Court have been to the same effect (*vide* cases in the *Punjab Record*, 21 of 1866, 59 of 1867, 79 of 1870).

If there had been no decisions either way, I should have been disposed in interpreting the provisions of Section 18 Act XVIII of 1869, and Section 167 Act I of 1872, to hold with the Madras Court, that an Appellate Court was bound to take notice of the want of stamp, and to refuse to act upon it unless and until in the case of documents which might be admitted on payment of the deficient stamp duty and a penalty, such payment was made ; where the document was of such a nature (*e. g.* a receipt or, as in the present case, a balance of an account) that it could not be received even on payment of a penalty, I should have felt inclined to hold that the Appellate Court must reject it altogether, and decide the case as if it had not been received. There is a case decided by the Privy Council (15 S. W. R. P. C. 33) which rather supports that view, but the point was not actually decided.

The weight of authority is however the other way, and as the previous decisions of this Court have been to the same effect, I consider that the Commissioner was right in acting upon the balance of account which had been received by the first Court though unstamped.

But as regards the second ground of appeal referred to above, I think the Commissioner ought to have enquired and come to a finding on the point whether only items, not then barred by limitation, were comprised in the balance struck. The written acknowledgment is only effectual under Section 20 Act IX of 1871, in giving a fresh period of limitation for a debt when it is signed before the expiration of the period prescribed for the debt. That period is three years from the date on which the debt was contracted, and in the case of a running account, is calculated from the date of each item.

I think this appeal should be accepted, and the case remanded to the first Court for further inquiry on the issue as to what items comprised in the balance were within the period of limitation at the time the balance was struck, and for fresh decision of the case accordingly.

Costs of this appeal to be costs in the cause.

LINDSAY, J., concurred.

No. 29.

RAM DYAL,—(Plaintiff),—APPELLANT,

Versus

BELI RAM,—(Defendant),—RESPONDENT.

} APPELLATE SIDE.

Case No. 1389 of 1877.

(LINDSAY AND SMYTH, JJ.)

Pre-emption—Limitation—Act IX of 1871, Schedule II No. 10—Actual possession.—On 3rd February 1876, B. R. purchased a shop from P. The shop was occupied by a tenant who accepted B. R. as his landlord on the same date, and agreed to pay the rent to him. No formal deed of sale was executed or registered till April 1876, owing to the vendor P. being in jail in execution of a decree, but the shop was verbally sold on 3rd February 1876, and a mortgage deed relating to the shop made over to the vendee B. R. In March 1877 the plaintiff instituted his suit for pre-emption.

Held that the sale was complete on 3rd February 1876, that B. R. took "actual possession" on that date within the meaning of Article 10 Schedule II Act IX of 1871, and that, accordingly, the claim was barred by limitation.

Regular appeal from order of Commissioner and Superintendent, Derajat Division, dated 20th June 1877.

Ram Narain, Pandit, for Appellant.

The facts are sufficiently stated in the following judgment delivered by

SMYTH, J.—I consider that the Commissioner was right in holding on the evidence that the sale of the shop took place on the 3rd February 1876. The shop was then in the occupation of a tenant, but he accepted the purchaser as his landlord on the 15th Feby. 1878.

above date, and agreed to pay the rent to him. That must, I consider, be taken to be the date on which the purchaser took actual possession under the sale. This view is supported by a ruling of the Full Bench of the Allahabad High Court in a case reported at page 311 of the Indian Law Report, I All. There a person purchased the equity of redemption of immovable property which at the time of the sale was in the usufructuary possession of the mortgagee, and it was held that the purchaser took actual possession of the property within the meaning of that term in Art. 10, Sch. II of Act IX of 1871, when the equity of redemption was completely transferred to and vested in him.

In the present case the formal deed of sale was not executed or registered till April 1876 : but that is accounted for by the fact that the vendor was in jail in execution of a decree, and could not be released till payment of the decree was made. He accordingly verbally sold the house on the 3rd February 1876, and on that date a mortgage deed, relating to the house and referred to in the deed of sale, was made over to the vendee, who on the same day filed in Court a receipt for Rs. 129-10-7 paid under the decree. The sale was complete on the 3rd February, and the subsequent execution and registration of the deed was merely for the purpose of preserving a record of the transaction.

It is argued for the pre-emptor that the vendor and vendee acted fraudulently in not giving notice of the sale to the pre-emptor, and as the pre-emptor did not become aware of the sale till the deed was registered, limitation should under Sec. 16 of Act IX of 1871, begin to run from the date of registration. I do not think however that the fact that the vendor omitted to give the notice required by Section 13 Act IV of 1872 to the pre-emptor, amounts of itself to a concealment by fraud from the pre-emptor of his cause of action within the meaning of Section XVI of the Limitation Act. The failure to give the notice is one of the elements which constitute the pre-emptor's cause of action, and it can hardly be taken to have of itself the additional effect of prolonging the period of limitation fixed by the Legislature for a suit brought upon such cause of action. No doubt where, as in the present case, there is no outward and visible sign of a change of possession, a pre-emptor may have difficulty in ascertaining that a cause of action has accrued to him, still where the sale or the change of possession under the sale has not been concealed from the pre-emptor by means of fraud, limitation runs from the date of the purchaser's taking actual possession of the property, even though the pre-emptor may not have known or had the means of knowing of the sale, or of the change of possession under the sale. I think this appeal should be dismissed with costs.

LINDSAY, J.—Concurred.

No. 30.

SUJA,—(Plaintiff),—APPELLANT,

Versus

PAHLWAN,—(Defendant),—RESPONDENT.

} APPELLATE SIDE.

Case No. 698 of 1877.

(FITZPATRICK AND FLOWDEN, JJ.)

Contract Act IX of 1872, Sec. 145—Principal and Surety—Money rightfully paid—Payment by Surety of debt barred as against principal.—Plaintiff, a surety, sued his principal to recover the amount paid by him under a decree obtained by the creditor against him as surety. In that suit the principal debtor was also sued, and the decree in the first court was against both. The principal appealed, and the decree against him was reversed on the merits. The surety did not appeal, but acquiesced in the decree against himself. The action of the creditor as against the principal debtor was barred by limitation, and the action against the surety would also have been barred, but for the fact that he had, before expiry of the period of limitation, struck a balance of the account against the principal, and signed an acknowledgment that the balance was due.

Held under the circumstances that plaintiff was not entitled to recover from his principal the amount which he had been compelled to pay under the decree against him.

A moral obligation to pay a debt barred by limitation subsists, though the legal means of recovering it have been lost, but a surety paying such a debt does not pay “rightfully” within the meaning of Sec. 145 of the Contract Act IX of 1872, and is therefore not entitled to recover from his principal.

Regular appeal from order of Commissioner, Rawalpindi Division, dated 13th March 1877.

FLOWDEN, J.—This is a suit by a surety against his principal to recover the amount paid by the former in a decree obtained by the creditor against him as surety. In that suit the principal debtor was also sued, and the decree in the court of first instance was against both the principal and the surety. The principal appealed, and on his appeal the decree against him was reversed on the merits. The surety did not appeal, but acquiesced in the decree against himself, though he preferred an appeal (which did not lie) against the order discharging the principal debtor, which appeal was dismissed.

9th Novr. 1877.

It further appears from the record of the first suit that the action of the creditor, as against the principal debtor, was barred by limitation, assuming that he had at one time been liable, and that the action against the surety would also have been barred but for the circumstance that he had during the currency of the period of limitation struck a balance of the account against the principal, and signed an acknowledgment that the balance was due.

The question is whether the surety is, under the above circumstances, and assuming that the principal debtor was at one time indebted to the creditor in the amount decreed, which it is admitted he never paid, entitled to recover from his principal the

amount which he has been compelled to pay under the decree against him.

In my opinion, this question must be answered in the negative, though I advance my opinion with hesitation, because the point is, so far as I am aware, a novel one and untouched by direct authority. It must therefore be dealt with and decided with reference to general principles.

The obligation of the surety is accessory to that of the principal, and under ordinary circumstances is extinguished when the principal obligation is extinguished. Payment by the principal for instance entirely exonerates the surety, where the obligation is payment of a money debt. Here however there is no payment, and the hypothesis is that of an unpaid debt of which the recovery by the creditor from the principal debtor is no longer possible, because the creditor's suit against him has been dismissed. The grounds of the dismissal appear to me to be immaterial, the important fact being that the debt has been decided in a valid legal proceeding to be irrecoverable by the creditor from the principal.

At the moment of that decision, the *legal* obligation of the principal debtor to pay the amount due in fact (upon the hypothesis assumed for present purposes) was extinguished, whether or not a moral or what is sometimes termed the natural obligation to pay it survived. It seems to me, with regard to the present question, quite unnecessary to decide whether under Act IX of 1871 (which governed the former suit as regards limitation) the bar of the action as a personal right and the extinction of that right are coincident. The one important fact is, in my judgment, that the legal obligation of the principal to the creditor is practically extinct: nor as I apprehend is it material that the judgment to that effect may have been erroneous: whether right or wrong, the fact remains that at the moment when it was pronounced, the principal's obligation to the creditor was finally extinguished.

The strong point for the surety, upon the assumption made at starting, of course is that the moral or natural obligation of the principal to pay his debt survived the decree. Assuming without conceding that this is so, it does not in my opinion avail the surety in an action like this, that moral obligation survives, and can be made available for certain purposes. For instance, by express and positive legislative enactment in section 25 of the Contract Act, that obligation is a good consideration for a new promise to pay the creditor, provided the promise be evidenced in a specified form.

Here the moral obligation is converted into a legal obligation, enforceable by action only with the will and by the act of the debtor. In the case under discussion, there is nothing of this kind, and nothing whatever to show that the principal debtor authorised or acquiesced in the acknowledgment of his indebtedness signed by the surety.

Then the question is,—has a surety who discharges the mere moral obligation of his principal a legal right to be indemnified by his principal? In my opinion he has not, in the absence of

some express legal provision to that effect. I am unable to find any such provision in the Indian Law. The Indian Contract Act enacts in Sec. 145 that "In every contract of guarantee there is "an implied promise by the principal debtor to indemnify the "surety; and the surety is entitled to recover from the principal "debtor whatever sum he has rightfully paid under the guarantee, "but no sums which he has paid wrongfully," but that section still leaves it open to the courts to say what has been "rightfully" paid by the surety.

I think a surety cannot be said "rightfully" to pay within the meaning of this section a sum of money which the creditor is unable by any process of law to recover from the principal debtor. Let me take the simplest instance,—suppose the creditor brings his suit against the principal debtor alone, and it is dismissed after trial on whatever grounds on the merits or as barred by limitation. The creditor then sues the surety as such for the same debt. The judgment in the first suit would, I apprehend, be conclusive evidence that the principal was not legally liable to the creditor, and if the plea were advanced, the suit against the surety would fail. But suppose that instead of advancing this plea, the surety without reference to his principal confessed judgment, and then sued the principal to be indemnified. Surely it would be open to the principal to contend that he was not liable to indemnify his surety for a payment which was virtually voluntary, and which, by making a proper defence, the surety would have avoided. The principal might I think successfully contend that the law exonerated him from performing his merely moral obligations, and that if the surety chose to discharge one of them for him, without any authority from him to do so, the surety discharged it at his own risk, and on his own sole responsibility.

Then, let me take the case one step further. The surety without reference to his principal signs an acknowledgment of the principal's indebtedness, of which the effect may be—let it be assumed that it is—to extend the period in which the creditor may sue the surety. I take it to be quite clear that it has no such effect as regards the principal, because a surety has no implied authority to sign such an acknowledgment for his principal. Here again I think the principal may successfully contend that the continued existence—the subsistence of the legal liability of the surety depends not upon his own original undertaking to pay on his principal's default, though that is of course one of the causes contributing to his liability, but primarily and immediately upon his own voluntary act in signing the acknowledgment, an act done without the authority of the principal.

It has been suggested that the surety may pay the debt of his principal during the period of limitation, and can then recover from him the amount due and paid by him to the creditor. This is undoubtedly true, but it does not follow that he can enlarge the legal obligation of the principal debtor. When the surety acts in the manner stated, he fulfils a subsisting legal obligation of his principal, and discharges him from a subsisting legal liability. Here the surety does, to use the language of the Contract Act in that portion which deals with general principles, that

which the principal was "legally compellable to do;" and it is therefore quite intelligible that the surety should be indemnified by the principal, in the absence of anything to show that the payment was intended to be purely voluntary.

Curious results would follow by holding that the principal debtor, though discharged from legal liability to his creditor, remained liable at the suit of his surety for indemnification, under the circumstances assumed in this case. A surety by concert with the creditor, which could not justly be termed "collusion," the motive being honorable and meritorious, could practically enable the negligent creditor, after any interval of time, to recover through him, the surety, his stale demand upon a debtor, by signing acknowledgments, or a written promise to pay the debt for which he was or had been liable as surety, suffering judgment to be passed and then suing the principal. The surety would thus be simply the channel by which the debtor's money would flow into the creditor's pocket in indirect contravention, as I apprehend, of the policy of the Limitation and Contract Acts, especially of the former, which limits the extension of the period of liability of debtors, unless by an acknowledgment made by their authority.

Again, the surety has the privilege of compelling the creditor to sue the debtor, or of suing himself for recovery of the debt due to the creditor. It would be entirely opposed to the policy of the Limitation Act, if the surety were at liberty to exercise this privilege, and defeat the debtor's plea of limitation to such an action, at any time the surety might choose, by merely signing acknowledgments of liability from time to time, or a written promise to pay before action brought. It would be somewhat startling to find that the surety who is in the original transaction between the three parties—creditor, principal debtor, and surety—subordinate to the principal debtor, entire master of the situation, and able by means of legal process to compel the debtor to perform moral obligations, of which it is from a legal point of view the essential characteristic that their performance is not legally compulsory, except under the express sanction of the law.

For the reasons I have stated, I am of opinion that the plaintiff is unable to maintain this action against the defendant, even assuming that the latter was at one time indebted to the creditor Deedoo, and I would accordingly dismiss this appeal with costs.

FITZPATRICK, J.—I too think that this appeal should be dismissed, though I must confess that in the absence of authority I give my opinion with a considerable amount of diffidence.

I think that if a surety, who pays the debt to the creditor after the creditor's remedy as against both principal and surety has become barred by limitation, cannot recover the amount so paid from the principal: it follows that a surety who, like the plaintiff in the present case, by acknowledging the debt extends the period of limitation as against himself, and is in consequence compelled to pay after the remedy against the principal has become barred, is similarly precluded from recovering from the principal—for otherwise the surety could always by giving an acknowledgment before the period had run out, do indirectly the very thing which ex-hypothesi he would not be allowed to do directly.

If I am right in this, the only question is whether a surety, who pays the debt after the creditor's remedy as against both principal and surety has become barred by limitation, is entitled to recover from the principal.

I am of opinion that he is not.

I know of no case in which the point has been considered, but turning to the civil law on which our law of principal and surety is to a considerable extent based, I find the rule laid down that "for the surety who has paid to have recourse against the principal debtor, it is necessary that he should not by his own fault have neglected to oppose the *fin de non recevoir*, if he had any, against the creditor," and that "if the surety had a *fin de non recevoir* to oppose to the creditor but it was such that he could not in honor oppose; in this case the surety is not indeed obliged to oppose it, but he ought not to deprive the debtor of the power of opposing it, therefore he ought to allow himself to be assigned for the payment, and have the principal debtor made a party to the cause in order that he may oppose it if he thinks proper; in default of doing so the surety will have no recourse against the principal debtor for what he has paid." (Pothier on Obligations, Evans' translation, vol. I pp. 278—9.)

This rule seems to me one of common sense and natural justice, and one which would be most necessary in this country to prevent collusion between the creditor and the surety, and I think accordingly that we should apply it unless there is anything opposed to it in section 145 of our Contract Act. I do not think there is.

Section 145 of the Contract Act is as follows:—

"In every contract of guarantee, there is an implied promise by the principal debtor to indemnify the surety; and the surety is entitled to recover from the principal debtor whatever sum he has rightfully paid under the guarantee, but no sums which he has paid wrongfully."

Now it may perhaps be contended that as there is at all events a moral obligation to pay a debt, though the legal means of recovering it have been lost by lapse of time, a surety paying such a debt has "rightfully" paid it, and is therefore entitled to recover from his principal.

I do not think this contention would be sound.

The second portion of the section which provides that the surety may recover from the principal whatever he has rightfully paid, must be read with the first portion which shows that the right so to recover is based on an implied promise by the principal to "indemnify" the surety—that is to say (see sec. 124) to save the surety from any loss caused to him by the conduct of the principal—and reading the two portions of the section thus together, I think a surety is not entitled to recover from the principal any sum he has paid, unless he has been compelled to pay such sum in consequence of some act or omission on the part of the principal. If the principal makes default, and the surety on being pressed for payment before the period of limitation has run out,

pays up to avoid litigation, or if on a suit being instituted the surety, having reasonable grounds for so doing, defends such suit, the loss entailed on him by paying the debt in the one case and paying the costs of the suit in the other, is obviously caused to him by the conduct of the principal in making default, and is accordingly recoverable under Section 145.

But if when the term of limitation has passed, and there is no remedy available to the creditor, the surety from a nice sense of honor pays him the amount of the debt, the loss to the surety (if "loss" it can be called) involved in such payment being the result not of the principal's default, but of his own voluntary act, is not I think recoverable from the principal under that section.

This I think would clearly be the proper construction of the Section if it had stopped at the end of the first portion, and it seems to me that the second portion, which is perhaps no more than a corollary to the first, has been added chiefly if not entirely for the purpose of bringing out the distinction exemplified by illustrations (a) and (b). I think a sum is "rightfully" paid within the meaning of this second portion of the section when the surety has been compelled to pay it as a result of the principal's default and without any mistake or want of prudence on his own part, and a sum is "wrongfully" paid when, though the principal's default may have been one of several converging causes going to necessitate the payment, the surety would not have been compelled to pay if it had not been for his own mistake or want of prudence. On these grounds I am of opinion that a surety cannot recover from his principal a debt which he has paid after the period of limitation has passed; and as I have already said, I further think that, assuming I am right on this point, a surety who, like the present plaintiff, has voluntarily given the creditor a fresh period of limitation within which to sue him and who has in consequence been compelled to pay after the expiry of the original period, cannot recover from the principal any sum which he may have been so compelled to pay.

The appeal is dismissed with costs.

No. 31.

RURA AND 17 OTHERS,—(Plaintiffs),—APPELLANTS,

Versus

LEHNA SING & 10 OTHERS,—(Defdts.,)—RESPONDENTS.

} APPELLATE SIDE,

Case No. 1005 of 1877.

(LINDSAY AND FLOWDEN, JJ.)

Tenancy Act, XXVIII of 1868, Section 9—Shamilat or Common land—Occupancy rights.—Section 9 of Act XXVIII of 1868 which enacts that a tenant cannot acquire rights of occupancy in common land under Chapter II of the Act, does not apply to cases where occupancy rights in common land have been acknowledged prior to the promulgation of that Act.

Civil Judgment No. 30 *Punjab Record* for 1872, distinguished.

Special appeal from the order of the Commissioner and Superintendent, Lahore Division, dated 3rd April 1877.

LINDSAY, J.—The plaintiffs, cultivators, say they hold and cultivate land under the proprietors of patti Mull and Lakkan; that they have all the rights of proprietors, though recorded as tenants with rights of occupancy. 24th Novr. 1877.

They claim to share in the produce of the *shamilat* of the two patti in proportion to their share of the Government revenue. They state the equivalent of this share to be 159 kanals 10 marlas of land, and they claim that area and the partition of it.

They say they have broken up waste land and have cultivated it (the area under cultivation by them is not declared) and that 4 years ago, that is 3 years after a private partition, the proprietors took from them forcibly the land they had brought under cultivation. They were not quite certain of their rights, and so did not sue to recover; but in a late suit the tenants of patti Jaga of the village in suit, having obtained a share in the *shamilat* land, they now press their claim.

The defendants deny the plaintiffs' claim to a share in *shamilat*, deny the fact that they have shared in the produce of the common land, or have grazed cattle thereon. They say that 14 or 15 years ago the *shamilat* was divided between the proprietors and each took his share—the plaintiffs never got a share, nor was there a division between plaintiffs and defendants seven years ago, nor have the plaintiffs at any time cultivated any portion of such land.

The defendants admit that 4 or 5 tenants in patti Jaga have obtained rights of occupancy in the common land of the patti; but this was owing to the fact that they had been in the habit of cutting wood from, and grazing cattle on, the common

land, whereas the plaintiffs have not done so, nor have they spent any money or aided in bringing the land under cultivation.

This suit has been decided upon the ground that this Court's judgment No. 30 of the *Punjab Record* for 1872 precludes the claim. The facts of the case have not been considered.

The tenure of tenants with rights of occupancy in the Firozpur district is a very curious one. They appear to have in some instances the rights of proprietors, and why they were not so recorded, it is difficult to say.

If the allegation of the plaintiffs be correct, there does not seem to be any valid reason why they should not have a decree, such as was obtained by similar tenants in patti Jaga.

The case No. 30 *Punjab Record* for 1872, does not in my opinion preclude this claim. It does not rule that under no circumstances can a tenant with rights of occupancy in the village or in a patti of a village, cultivate with rights of occupancy a portion of the common land of the village or patti. It rules that a tenant *cannot acquire* such rights in the common land under Chapter II, Act XXVIII 1868, and that no tenant shall be deemed to acquire a right of occupancy by mere lapse of time. It does not touch cases where the hereditary rights of tenants in common land have been acknowledged long previous to the promulgation of the Act.

To such cases, Section 9 of the Act, as pointed out by Boulnois J., would not or at all events might not, be applicable.

There is much in the record that leads to the belief that the proprietors, many years ago, acknowledged the rights of the tenants to hold and cultivate common land on the terms they held and cultivated land outside the area of the common land.

I find from a report of the Naib Kanungo that, up to F. S. 1264, the Government demand on the patti was paid in the aggregate without specification of the quota paid by tenants, and that paid by proprietors; that from F. S. 1265 up to 1273 F. S. the jama assessed upon the *shamilat* was taken *from tenants and from proprietors* in proportion to the jama they respectively paid for land other than *shamilat* or common land; that from F. S. 1274 the proprietors alone paid the revenue due upon the common land and have cultivated it.

Now, if this report be based upon true facts, it appears the plaintiffs at one time had possession of and cultivated common land, sharing in the produce thereof, and paying a proportional share of the Government demand. The plaintiffs were ousted on or after F. S. 1274, and did not make any objection for the reason they have recorded. It is necessary to determine the exact conditions on which the plaintiffs occupied and cultivated the common land, or rather what was common land.

I think the case should be remanded to be retried on its merits.

The questions to be decided appear to be :—

1. Have the plaintiffs in fact cultivated any and what portion of land that was at some period common land, on what terms

and during what period and did they bring waste land under cultivation ?

2. If so, why were they ousted, and have they now a right to a portion, and, if so, what portion of the land in suit and on what terms ?

3. Does the fact of partition preclude tenants from enjoying rights they had previously enjoyed ?

When did partition take place, and what were the terms of the partition and between whom was the partition made ?

Were the rights of tenants, assuming they had rights, protected ?

I do not find from para. 226 of the Firozpur Settlement Report, quoted by the Judicial Assistant, that tenants lose the right to share in profits from common land when that land is divided between the proprietors.

There may be an absence of any express provision in the settlement record that tenants may still share after partition of common land, but if, on the proved facts, it be found that notwithstanding partition, the tenants, plaintiffs, have continued to share in the common land, and only gave up their rights through a mistaken notion of their rights, I think the omission is of no weight.

Moreover, if up to partition and perhaps subsequently, the tenants cultivated common land, and paid their quota of the demand upon it, there must be strong reasons given, in the absence of any express entry in the settlement record on the question, for holding the mere fact of partition to preclude the further enjoyment of rights enjoyed for a series of years. I observe the plaintiffs say they cultivate land of the proprietors of patti Mull and patti Lakkan ; if this be so, it will be necessary to make the proprietors of patti Lakkan co-defendants.

I would remand this case to the first Court ; costs will be costs in the cause.

LOWDEN, J.—I concur in thinking that the claim advanced by the plaintiffs has not been adequately considered : no enquiry has in fact been made into the points in issue between the parties, and it seems clear that a decision in plaintiff's favor as to the alleged partition of seven years ago and the possession by them of a share of common land under that partition would go a long way, taken in connection with the circumstances under which they had previously cultivated, in support of the claim to share in the lands so divided.

6th Decr. 1877.

It is not a universal rule that hereditary cultivators cannot share in *shamilat* land after partition,—at any rate in the Firozpur district, and it is remarkable that in another patti of the village to which this suit relates, it has been held by the Deputy Commissioner in appeal, confirming the order of the lower Court, that they can do so.

Nor is the silence of the *wajib-ul-arz* conclusive on the point, though it tells against the plaintiffs' claim.

Case No. 30 in the *Punjab Record* 1872 seems to me to have a very remote bearing upon the questions in issue in this case, which presents some entirely different features.

Until full investigation of the past relations of the parties and the transactions into which they entered has been made, it would, I think, be premature to express an opinion as to the rights of the plaintiffs. They may or may not succeed ultimately; but I am quite clear that they are entitled to have their claim thoroughly investigated and I accordingly concur in the proposed order of remand.

6th Decr. 1877.

LINDSAY, J.—The case is remanded to the first Court.

No. 32.

REVISION SIDE.

{ CHOWDRI HIAT AND WALIDAD,—(Plffs.),—PETITIONERS,
Versus
JAI KISHEN—(Defendant,)—RESPONDENT.

Case No. 119 of 1877.

(FITZPATRICK, PLOWDEN AND ELSMIE, JJ.)

Act VIII of 1859, Sections 119 and 239—Ex parte decree—Application to set aside, made after time—Discretion of Court to admit—Informality in process of execution under Section 239—Effect of.—On 28th April 1876 C. H. and W. obtained an *ex parte* decree against J. K., in execution of which certain shops were attached on 29th June 1876. On 2nd August 1876 J. K. applied under Section 119, Act VIII of 1859 to have the *ex parte* decree set aside. The process of execution issued under Section 239, Act VIII of 1859, was informal, because (a) no copy of the prohibitory order was attached to the door of the Court, or other conspicuous part of the Court-house, and (b) the order was not read aloud in any place on or adjacent to the shops sought to be attached.

Held by PLOWDEN AND ELSMIE, JJ., that no legal process of execution was executed under Section 239 within 30 days of the application made by J. K. on 2nd August 1876, and therefore, that his application was within time.

Per FITZPATRICK AND PLOWDEN, JJ.—A Court has no discretion to set aside an *ex parte* decree on application made more than 30 days after process for enforcing the decree has been executed, even though it appear that the defendant had, as a matter of fact, not known of the execution till within 30 days before he made his application.

A party insisting upon the provisions of a severe and stringent law, like that relating to *ex parte* decisions, is bound to see that every formality is strictly complied with; where this is not done a Court is bound to hold, for the purposes of Section 119 Act VIII of 1859, that no process has been executed.

On 28th April 1876, Chowdri Hiat and Walidad, plaintiffs, obtained an *ex parte* decree against Jai Kishen, defendant. In execution thereof 14 shops belonging to defendant were attached on 29th June 1876. On 2nd August 1876 defendant applied to have the *ex parte* decree set aside under the provisions of Section 119, Act VIII of 1859. This application was rejected on 6th October 1876 by the Court of first instance (Extra Assistant Commissioner).

Thereupon defendant appealed to the Commissioner, Rawalpindi (Colonel Cripps) who after shortly stating the above facts gave judgment as follows, remanding the case :—

“The plaintiffs say that defendant had possession then of those shops, but defendant says that such was not the case, and that he had no knowledge at all of the attachment at that time. I think that for the ends of justice it is necessary to inquire through the sheriff as to the actual state of possession of these shops at time of attachment, viz., whether defendant's agent was in possession or whether, as urged by defendant, the plaintiffs themselves had possession.”

The Extra Assistant Commissioner made a return to the effect that the sheriff stated that when he attached the shops, neither defendant nor any agent of his was in possession. The defendant, judgment-debtor, contended that he had no notice of the suit, or the decree or of the execution proceedings, that he filed his application under Section 119 as soon as he heard of the execution proceedings, and therefore, that his application was not barred by lapse of time.

Upon the above return, the appeal came on for hearing before Mr. D. C. Macnabb, Commissioner, who gave judgment as follows :—

“It appears to me that the appellant (defendant) in this case may have been lax in looking after his own interests; but I do not think that the Court in which the *ex parte* decree was given took proper measures to secure his knowledge that a suit had been filed against him. He was not in hiding at Ludhiana, and the Court was informed that he was residing there, so a summons should have been served on him through the Ludhiana Court. His application was put in as soon as he came to Pindi and heard of the attachment. I accept the appeal and direct the retrial of the case decided *ex parte*, on its merits.”

No appeal lying from the above order, plaintiffs petitioned the Chief Court under Sec. 35, Act XXIII of 1861 to set aside the order of the Commissioner as made without jurisdiction.

Ram Narain, Pandit, for plaintiffs contended that process of execution having been enforced on 29th June 1876, against the property of the judgment debtor, his application of 2nd August 1876 to set aside the *ex parte* decree was barred under Article 157 Schedule II, Act IX of 1871, and that the Commissioner had exceeded his jurisdiction in directing a retrial on the merits.

The case was remanded for further enquiry by the following order of

FITZPATRICK, J. (PLOWDEN, J.—Concurring). Colonel Cripps 10th Aug. 1877.
appears from his order of 19th December 1876 to have supposed that, though an application under Section 119 of Act VIII of 1859 to set aside an *ex parte* judgment was made more than 30 days after process for enforcing the judgment had been executed, there was a discretion to set aside the judgment if it appeared that the applicant had, as a matter of fact, not known of the execution till within 30 days before he made his application. He

seems to have assumed that for the ends of justice such a discretion must be held to exist. Mr. Macnabb's order of the 15th February 1877 admitting the application appears to have been passed on a similar assumption. This being so and no such discretion being allowed by the law, I think it would be open to us under the 44th Section of Act IV of 1866 to set aside that order. Before doing so, however, I think it would be well to enquire whether process of execution was as a matter of fact executed on the 29th June or by any subsequent date more than 30 days before the date of the 2nd of August, the date of the application. If not, the application would be within time and I would in the exercise of the power given us by the 44th Section of Act IV of 1866, remand the application to the first Court for disposal on the merits.

From the execution file it would appear that the prohibitory order was not fixed up at the Court house as required by Section 239 of Act VIII of 1859, and as a party insisting on the provisions of a severe and stringent law like that relating to *ex parte* decisions is bound to see that every formality is strictly complied with, I think that if the order was not fixed up at the Court house as required, we should be bound to hold that for the purposes of Section 119 of the Act, process had not been executed and the application to set aside the decree would accordingly not be barred by lapse of time.

I would before making any order send the case back to the first Court for an enquiry as to whether all the formalities required to complete the attachment of the shops were completed more than 30 days before the 2nd of August.

The enquiry on remand was conducted by Mr. Drummond, Assistant Commissioner who made the following return:—

“ This has been remanded by the Chief Court under Section 44 of Act IV of 1866, to the first Court, for decision of a preliminary issue with a view to rehearing of the case on the merits. As the order is worded, it appears to me that it is for this Court merely to find on the special issue framed substantially by the Chief Court in the conclusion of their order, *viz.*—

(1). Were all the formalities required to complete attachment of certain immoveable property, moved to be attached in course of the execution proceedings in issue, completed more than 30 days before the 2nd of August 1876 or otherwise? Onus on Plaintiffs, Petitioners.

On perusal of the file it appears that execution process has only once issued on the decree in question, *viz.*, on the 16th June 1876, that is more than 30 days before the 2nd of August 1876, and was returned with a report by the sheriff on the 29th of the same month, also more than 30 days before that date.

But on examination of the sheriff and the written report of service, two defects in the manner of service as compared with the provisions of Section 239 of Act VIII of 1859, are apparent:—

(1.) No copy of the prohibitory order was attached to the door of the Court, or other conspicuous part of the Court house.

Now it appears that the *original* order should be so fixed up, but in the present case it was on the contrary fixed up on a part of the property sought to be attached.

(2.) The order does not appear to have been read *aloud* in any place, on or adjacent to the shops sought to be attached.

In fact, it appears to me from the deposition of the nazir as recorded above, that it was impossible that service should have been properly effected under Section 239 as he seems to have been profoundly ignorant of the terms of that Section. I therefore find that the formalities required by Section 239 of Act VIII of 1859 for the attachment of the property in issue were not completed at any date more than 30 days before the 2nd of August 1876.

File to be submitted to the Chief Court through Deputy Commissioner.

Upon receipt of the above return, the case came on for hearing before Plowden and Elsmie, JJ. The judgment of the Chief Court was delivered by

LOWDEN, J.—Having read the return to this Court's order, *22nd April 1878*, we concur in holding that no process of execution was executed under Section 239 Act VIII of 1859 within 30 days of the defendant's application under Section 119 of that Act. There is therefore no ground for interfering with the Commissioner's order, directing an *ex parte* judgment to be set aside. Application dismissed.

No. 33.

KHAZAN SING,—(Defendant),—APPELLANT,

Versus

THE SECY. OF STATE FOR INDIA IN COUNCIL,
(Plaintiff),—RESPONDENT.

} APPELLATE SIDE.

Case No. 619 of 1877.

(LINDSAY AND SMYTH, JJ.)

Voluntary payment—Suit to recover—Mistake of law or fact—Construction of document.—Where A., misconstruing the terms of a lease, made payments or granted remissions of money to B., and subsequently sued B. to recover back the money on the ground that it had been paid or remitted by mistake, *Held*, that such mistake was one of law, or ignorance of a particular right, and not a mistake of fact, and therefore, that A. was not entitled to recover.

*Special appeal from order of Commissioner and Superintendent,
Rawalpindi Division, dated 2nd April 1877.*

Spitta and Ram Narain, Pandit, for Appellant.

Rattigan, Offg. Govt. Advocate, for Respondent.

The facts are fully stated in the following judgments :—

18th Jany. 1878.

LINDSAY, J.—The defendant took a contract from Government for the sale of drugs in the district of Rawalpindi, from the 1st April 1868 to the 31st March 1873. The suit on the part of Government is to recover from the defendant Rs. 9,298-2-8, being the aggregate of sums erroneously credited to him between the 4th January 1870 and the 31st March 1873 on account of the departure of the 20th Hussars from Campbellpore, tahsil Attock, Zilla Rawalpindi. The sums so credited were made at the rate of Rs. 274 per mensem, from the 4th January 1870 to the 4th May 1870, and from the 5th May 1870 to the 31st March 1873, at the rate of Rs. 234-8 per mensem.

This alteration was made by reason of a battery of Artillery having gone to Campbellpore on the departure of the Hussars, and the consequent liability of the defendant, under the terms of his contract, to pay a certain sum for the battery.

It is well at this place to give the translation of Section 10 of the contract under which sums of money were given to or taken from Government in excess or in diminution of the amount mentioned in the contract.

The translation is a fair one and was made by this Court in a former suit between these parties:—

“ If troops leave the district and do not return for upwards of three days, a remission will be made in the payment to be made by me in proportion to the number of such troops. In like manner, if ever more troops happen to be in the district or if such troops while passing to any place (*kahin*) stop in the district for more than three days, I will pay more than the sum contracted to be paid by me in proportion to the number of such troops.”

In 1872, a large camp was formed at Hussan Abdal, tahsil Attock. The Government demanded from the defendant sums in excess of the amount entered in the contract in accordance with Section 10 of the contract, by reason of the influx of troops into the district of Rawalpindi. He paid the claim, but contested it in the suit to which I have just referred, on the ground that the construction put upon Section 10 of the contract was a wrong one, and for other reasons.

This Court came to the conclusion that, as regards money paid under a mistake of law, both English and Roman law decide against the right to recover, though the question had been much disputed, but allow the recovery of money paid under a mistake of facts, or as put by the Court “when payment has taken place in ignorance of facts.” It further held that: “The English law declares that, if a mere claim is made upon a person without any legal proceedings and he pays it with full knowledge of all the circumstances of the case and without any compulsion or necessity, although the claim was unfounded, and he might have successfully resisted it, such payment is held to be voluntary and cannot be recovered back.”

The Court held that the plaintiff was not in ignorance of any fact whatever attending his position ; that as there was no pressure put on the plaintiff, the payment being voluntary, he could not recover.

In the present appeal, the main contention of Government is that the money was erroneously paid to the defendant by reason of ignorance of the true state of the facts of the case ; that it was an error to give credit to the defendant to the extent of Rs. 274 per mensem for a Cavalry Regiment when that is the sum paid for a European Regiment in the Cantonment of Rawalpindi ; that it was absurd to give a remission of Rs. 274 per mensem when the entire contract for Attock tahsil was only Rs. 166 per mensem.

There is no doubt that the lower Courts are quite right in coming to the conclusion that, on the departure of the Hussars from Campbellpore, the defendant was strictly only entitled to a reduction of Rs. 99 per mensem,—that being the average sum paid in former years for the Cavalry Regiment at that station. It is quite clear that Rs. 166 per mensem fixed for Attock tahsil was calculated with reference to the location of troops at Campbellpore and Attock, and there can be no doubt that the terms of Clause 10 of the contract refer to the coming and going of troops, not only from the Cantonment of Rawalpindi but from the whole district, and it is strange that counsel for Government in the first Court should have set up a plea to the contrary.

But it was in 1868, and has been since the custom to calculate claims for increase and reduction of the sum contracted for with reference to the sum payable for the *entire* district and the rates entered in the contract for the Rawalpindi Cantonment, and as there was no Cavalry Regiment at Rawalpindi when the contract was made in 1868 the defendant asked for a reduction from 4th January 1870 at rates allowed for a European Regiment, and he was so paid, after considerable enquiry and consideration during the year 1871, to the close of the contract, and it was the rate he had to pay Government for Cavalry Regiments and other troops at the Camp at Hussan Abdal in 1872,—a payment which this Court held he had made voluntarily and which he could not recover from Government. This case is now before us on special appeal, and the main points for decision are these.

The plaintiff having voluntarily and after consideration and care, paid the sum claimed, can he now sue to recover it ?

Can he be allowed to plead that he misunderstood the terms of the contract when he commenced giving credit to the defendant in the sum of Rs. 274 on the departure of the Hussars from Campbellpore ?

That the plaintiff, having realized from the defendant on account of Cavalry and other troops at Hussan Abdal at the rate of Rupees 274 per mensem cannot in equity claim to pay a less sum to the defendant on account of troops that left Campbellpore.

There is no doubt that the district authorities in 1871, according to their lights, sifted the allegations made by informers, that

the reduction made to the defendant was too large. These informers alleged that the Government was imposed upon by the defendant : their petitions are on the file, they point out that by the conditions of the Attock contract the defendant was not entitled to a reduction of Rs. 274, the whole contract for the tahsil being only Rs. 166 per mensem.

Exhibit C is an order by the Deputy Commissioner, and an order by the Extra Assistant Commissioner dated 3rd January 1871. The Extra Assistant Commissioner states that he has, after careful inspection of the returns of Regiments and after comparing them with remission statements in the Cantonment office, come to the conclusion that the remission granted to the defendant is not excessive, nor contrary to the terms of the contract. There is reason for believing, from the terms of the order of the Deputy Commissioner dated 15th February 1871, that the correspondence on the question had been sent to the Financial Commissioner, but I do not find any order of his on the file. There is also an order dated 9th May 1871 directing a full account of the remission to be drawn out, showing why it was given, how much was given, and on what calculations.

Mr. Delmerick on the 13th May 1871 sent in his report ; it is not on the file. On the 9th June 1871 the Deputy Commissioner consigned the case to the record room ; and sent back petitions and letters to the Commissioner.

There are also exhibits on the file which show that the Commissioner sanctioned the payments, or rather the remissions to the defendant.

It is impossible to accept the view urged by Mr. Rattigan that the facts of the case were not known to the agency employed by Government. The facts were pointed out, and, after enquiry, the proper authorities thought the remission was not excessive.

There is also no doubt that Government took from the defendant, on account of Cavalry Regiments and other troops at Hussan Abdul, at the rate of Rs. 274 per mensem, the Rawalpindi Cantonment rate. Counsel admits to us that this was a mistake, and he offers to refund, but the defendant naturally objects to re-open all the past accounts, contending that he will stand by his appeal, that re-opening old accounts will entail upon him more trouble and annoyance.

If we accept the principle laid down by this Court in the suit of Khazan Sing against Government, and I have no reason for dissenting from it, it follows that Government cannot recover the money it claims.

The payment was voluntary and made after enquiry on the very point now urged. It is impossible to hold that Government through its agents was not aware of the facts : the agents were aware of the facts, but notwithstanding that knowledge the payment was continued. That there was error I allow, but it is not every error that warrants a man years subsequently to trouble another man and bring him into Court for the purpose of recovering money voluntarily paid for years upon an erroneous claim,

which claim might have been contested and should have been contested at the time the claim was made. There is no doubt that the case of the defendant is a very hard one: he was made to pay by the agents of Government in 1872 at the rate of Rs. 274 per mensem, when a far lower rate should have been taken and this Court would not accept his pleas but upheld the action of the Government officials, and as the Commissioner rightly says, if the defendant be compelled to refund at the rate of Rs. 99 per mensem, a great practical hardship will be inflicted upon him, and were it not that he considered it impolitic to, as he terms it, perpetuate a mistake, his decision might have been otherwise. It appears to me that in equity the Government cannot maintain this case. There has been no fraud, no concealment of facts, every act of the defendant has been so far as the record goes, open and straightforward, and I fail to see why we should not apply to this case the principle expounded by this Court in the former suit, and this will only be dealing with the case in the spirit of the Notification of the Supreme Government No. 832 dated 14th May 1873 (*Punjab Record* for 1873, "Supreme Government Orders," p. 56.)

SMYTH, J.—The defendant took a lease from Government of 18th Jany. 1878, the monopoly of the sale of intoxicating drugs in the Rawalpindi District for 5 years from 1st April 1868 to 31st March 1873, at an annual rent of Rs. 21,500. This sum was apportioned over the district as follows:—

Rs. 1,260 per mensem for the Cantonment of Rawalpindi,
viz:—

Rs. 548	for two European Infantry Regiments.
„ 430	for a Native Infantry Regiment.
„ 79	for 2 Batteries of Artillery.
„ 170	for a Native Cavalry Regiment.
„ 33	for the Sudder Bazar.

Rs. 120-10-8 for the Rawalpindi Tahsil.

„ 166	„	for Attock	„
„ 160	„	for Murree	„
„ 26	„	for Pindee Gheb	„
„ 26	„	for Futeh Jung	„
„ 9	„	for Kahuta	„
„ 24	„	for Gujar Khan	„

As the income from the sale of drugs is materially dependent on the number of troops which, for the time being, is stationed in the district, the lease (Clause 10) contained a stipulation to the effect that, whenever troops to the number of one company or upwards should leave the district and stay away for three days or longer, a remission in proportion to the number of troops leaving should be made in the rent payable by the lessee; and similarly the rent would be proportionately increased whenever troops to the above number should come to the district and remain for three days or upwards.

At the time the lease was granted, the 20th Hussars were stationed at Campbellpore in the Attock tahsil, which explains why the sum apportioned to that tahsil was so much larger than that apportioned to tahsils where no troops were located. In January

1870, the 20th Hussars left Campbellpore and the Rawalpindi district, and no other cavalry Regiment was sent in its place. The lessee accordingly claimed (and rightly so) a remission of part of the rent in accordance with the stipulation contained in Clause 10 of the lease. The lease contained no provision as to the amount of remission which should be granted if a European Cavalry Regiment left the district. But it contained a specification of the amount of the rent which was apportioned to the two European Infantry Regiments stationed at Rawalpindi, *viz*:—Rs. 548 or 274 for each, and the lessee claimed a remission at that rate, *viz*:—Rs. 274 per mensem in consequence of the departure of the 20th Hussars from Campbellpore; and the Commissioner on the application of the Cantonment Magistrate, sanctioned the remission. It is clear that a mistake was made in granting the remission at that rate, for not only is the rate allowed for a European Infantry Regiment no criterion of the rate which should be allowed for a European Cavalry Regiment (seeing that they differ greatly in the number of men), but the remission granted (Rs. 274 p. m.) was absolutely in excess of the total sum (Rs. 166 p. m.) paid to Government for the whole of the Attock tahsil, which included other shops besides that at Campbellpore.

The mistake however was made, and remissions from month to month were sanctioned at the above rate from the date of departure of the 20th Hussars.

Petitions were presented to the proper authorities by informers in 1870 and 1871 bringing the mistake to notice, and they were made over to Mr. Delmerick, Extra Assistant Commissioner, for enquiry. He reported on the 3rd January 1871 that the remissions granted were not excessive or contrary to the terms of the contract; and this view was accepted by the authorities for the time being. A report to that effect was made to the Commissioner but it is not with the file. As already stated, the Commissioner, who had full authority to make the remissions, continued to make them at the above rate, and this went on till the expiration of the lease.

So far, the mistake was altogether in favor of the lessee. But in the beginning of 1872 Government formed a large Camp of Exercise at Hussan Abdal in the Attock tahsil, and with it came two European Cavalry Regiments. The lessee was, in accordance with the stipulation in Clause 10 of the lease called upon by Government to pay enhanced rates for this additional body of troops, and Government charged for these two Cavalry Regiments at the rate of Rs. 274 each per mensem. Obviously the lessee could not reasonably object to pay at this rate, as it was the rate at which remissions had been allowed to him when the 20th Hussars left the district; but the lessee objected to pay the enhancement demanded, not however because the rates claimed were excessive, but because, for reasons which it is unnecessary to state, he denied the right of the Government to claim any increase whatever for the Camp of Exercise. He had however to pay the increase demanded, which he did under protest, and he subsequently in 1874 brought a suit against Government to recover back the amount which he alleged he had been called upon to

pay in excess. His suit was dismissed, and the decision was upheld on appeal to the Chief Court on the 6th May 1875. The Chief Court held in that case that : " If a mere claim is made upon a person without any legal proceeding, and he pays it with full knowledge of all the circumstances of the case and without any compulsion or necessity, although the claim was unfounded and he might have successfully resisted it, such payment is held to be voluntary and cannot be recovered back."

Apparently, in the course of the proceedings in that case, the Government discovered the mistake which had been made in the rate of the remissions granted to the lessee on the departure of the 20th Hussars, and accordingly it brought the present suit against the lessee to recover back the amount of the remissions so granted in excess, viz:—Rupees 9,298-2-8, alleging that they were made by mistake and in ignorance of the full facts of the case. Government obtained a decree for Rs. 5,437-2-0 which was upheld in appeal to the Commission^r. The defendant now brings this special appeal on the following grounds:—

I. That plaintiff has no cause of action and is not entitled to the refund sued for, inasmuch as the money had been paid voluntarily and with a full knowledge of all the facts.

II.—That plaintiff having accepted appellant's interpretation of the terms of the lease and having allowed appellant monthly remissions for 39 months regularly, is not now entitled to sue for refund of such payments on the ground that he (plaintiff) had been mistaken in interpreting the terms of the lease.

III.—That plaintiff having realized from defendant about Rs. 11,000 in Attock tahsil on the occasion of the Hussan Abdal Camp of Exercise at the rates fixed in the lease for the Rawalpindi Cantonment (there being no special rates fixed for Attock tahsil), must also pay defendant for troops that had left Attock tahsil at Rawalpindi Cantonment rates.

I consider that the remissions granted to defendant were equivalent to an actual payment of the money to him by Government. The present suit is therefore in fact one to recover back money paid by Government by mistake, and the question for decision seems to me to resolve itself into this, whether the mistake was one of fact or of law. For while no amount of mere negligence avoids the right to recover back money paid under a mistake of fact, money paid under a mistake of law cannot in any case be recovered, and in the matter of recovering back money paid by mistake, ignorance of particular rights, however excusable, is on the same footing as ignorance of the general law (Pollock on Contracts, 371).

Applying this principle to the present case, I fail to discover that any mistake of fact was made in granting the remissions. The facts were fully known to both parties. The attention of the authorities had been specially directed in 1870 and 1871 to the very point now in dispute, and inquiry was made regarding it, and it was held that the remissions granted were not excessive or contrary to the provisions of the lease. Remissions continued to

be granted at the same rate down till the expiration of the lease, and moreover Government claimed and recovered enhancement at that rate when other European Cavalry Regiments came to the district; clearly then the mistake which was made was not one of fact, nor did it arise from ignorance of the facts; it arose solely from a wrong construction which was put upon the terms of the lease, and the money was paid away in excess upon such erroneous construction. But that is not a mistake of fact; it is more like a mistake of law, or ignorance of a particular right.

I hold then, under the circumstances of the case, that although the money was undoubtedly remitted (or in other words paid away) to the defendant under a mistake, as the mistake was not one of fact, the Government is not entitled to recover it back. The appeal is accepted and the suit dismissed with costs throughout.

No. 34.

APPELLATE SIDE. {

R. PARKER,—(Petitioner),—APPELLANT,

Versus

THE SIMLA BANK CORPN., LIMITED,—RESPONDENT.

Case No. 1089 of 1877.

(LINDSAY, PLOWDEN AND SMYTH, JJ.)

Act IV of 1872, Sections 22 and 23—Jurisdiction of Insolvent Estates Court—Residence of insolvent.—P. in order to take advantage of the Insolvent Estates Court at Lahore, rented a house in Lahore and resided in it from time to time for the express purpose of bringing himself within the jurisdiction of the Lahore Court. His ordinary place of residence before he presented his petition was and continued to be Umballa where his wife and children were, and he had never carried on business at Lahore. *Held* that P's. residence under the circumstances was not sufficient to give the Lahore Court jurisdiction. A debtor who does not reside or carry on business and who owes no debts within the local limits of the jurisdiction of the Insolvency Court to which he applies under Section 23 Act IV of 1872, is not entitled so to apply and does not become entitled by coming to reside temporarily within the jurisdiction with the sole and express object of making such application.

Appeal from order of Judge Insolvent Estates Court, Lahore, dated 7th July 1877.

Spitta for Appellant.

Cullin for Respondent.

Mr. Parker, in order to take advantage of the Insolvency jurisdiction of the Insolvency Court at Lahore, rented a house in Lahore, and resided in it from time to time, and solely for the express purpose of bringing his case within the jurisdiction of the Lahore Court.

The Insolvent Estates Court Judge considered that Mr. Parker was not a resident in Lahore and within the jurisdiction of the Insolvency Court, and rejected his petition.

Mr. Spitta for the appellant contended that *Mr. Parker's* residence was *bonâ fide*, and sufficient to bring him within the jurisdiction of the Lahore Court. He cited in support of his views :

Ganendro Mohun Tagore v. Raja Juttendro Mohun Tagore and others, 387 Madras Jurist for 1874 P. C.; *Massey v. Burton*, 36 Law Journal, Exchequer, 101; *Etherington v. Wilson*, 45 Law Journal, Chancery, 153.

He contended that it was monstrous injustice to deprive a bankrupt of the aid of the Insolvent Act, solely by reason of his not being a permanent resident within the territorial jurisdiction of the Court; that there were only three Insolvency Courts in the Province and if a man might not rent a house for a time within the jurisdiction of the Court, and so be able to obtain the aid of the Court, great injustice and hardship might follow.

Mr. Cullin for the respondent contended that the alleged residence of *Mr. Parker* was a mere sham; that the object of Government would be defeated by allowing a bankrupt to rent a house, live in it for a day, now and then, and thus become a resident within the jurisdiction of the Insolvent Court. He cited the cases of :

Guru Jowahir Sing, Bankrupt, 42 *Punjab Record* for 1873; *Fatima Begam v. Sakina Begam*, 1 Indian Law Reports, Allahabad, 52. *Tietkins*, Insolvent, 1 Bengal Law Reports, 85.

The appeal came on for hearing before *Lindsay and Fitzpatrick, JJ.*, and was referred to a Full Bench by the following order, which was delivered by

LINDSAY, J.—The question to be determined is this : Can a man, in order to take the benefit of the Insolvency Act and who does not ordinarily reside within the jurisdiction of the Insolvent Court, hire a house within the jurisdiction of the Court, live in it now and then, and thus bring himself within the jurisdiction of the Insolvent Court?

The case of *Guru Jowahir Sing* is similar to this case.

The Chief Court then ruled that, as the Act, IV of 1872 was silent as to the question of residence, the point in issue, *viz.* whether *Guru Jowahir Sing* dwelt within the jurisdiction of the Lahore Insolvency Court must be decided in accordance with Section 5, Act VIII of 1859, and it found that the *Guru* did not dwell in Lahore.

My colleague, *Mr. Justice Fitzpatrick*, considers the question sufficiently important to go before a Full Bench : I concur. The point referred is this :—

Does the fact of *Mr. Parker* having rented a house in Lahore, and lived in it now and then, make him a resident within the jurisdiction of the Lahore Insolvency Court, none of his debts having been contracted in Lahore?

The following judgments were delivered by the Full Bench :—

LINDSAY, J.—The Insolvency rules in Act IV of 1872 do not specify what circumstances confer jurisdiction over the person of a debtor. 17th Decr. 1877.

But from the terms of Section 22 of Act IV of 1872, it may be fairly inferred that it was the intention of the Legislature that only persons residing or dwelling,—that is, whose houses are situate within the specified local area of the Insolvent Court—shall be subject to its jurisdiction.

Now, I take the words residing or dwelling to mean the true residence of a man, that is his home. This was the meaning accepted by the Exchequer Court in the case of *Lambe v. Smythe*, 24 Law Journal, 287, Exchequer.

I do not think the mere taking a house for a special and temporary purpose, with the intention of returning to his true home, enables a man to bring himself within the jurisdiction of an Insolvent Court.

I do not think the case of *Massey v. Burton* should govern this case. In that case it was held that it was no objection, under the County Court's Act, to the jurisdiction of a County Court that the plaintiff had become resident within the district of the Court for the very purpose of giving it jurisdiction, provided the residence was actually and *bonâ fide* and not colourably and collusively acquired before the issue of the summons. Apparently, the residence only commenced the very day before the summons issued. The Court held that on the face of the affidavit of the plaintiff, the residence was *bonâ fide*.

Nor can the case of *Etherington v. Wilson* be accepted as a precedent. That was a case where a man qualified himself to vote by becoming a parishioner. Both cases were decided under special laws.

The case of *Ganendro Mohan Tagore* is very different from this case and it is in no way applicable. There, it was shown that the person to whom the testator had devised the house in suit had in fact used it as a house of business, occupying it daily for some hours: that was held to be a residence in the sense contemplated by the testator. It is true that a man may have more than one residence and he may live a few days in one and a long time in another. The number of days that a man lives in a particular place is not what constitutes residence. We have to see whether a man will return to that residence. Whether in fact it is one of his homes though only for a short time on each occasion. Now, it cannot be contended that Mr. Parker's house in Lahore was his true home. Once passed through the Insolvent Court he would leave it not to return: his home was in Umballa and the hills. There is a case directly in point to be found in Yate Lee's Law and Practice of Bankruptcy p. 344, where it was held, in a case similar to this one, that the petitioner who had come over from Ireland and had resided sixteen weeks in hotels in London and Sussex, his wife and family being in Ireland where he had contracted the greater portion of his debts, was not within the jurisdiction of the London Court.

In my opinion the Insolvent Court was right in refusing to accept the petition of Mr. Parker.

SMYTH, J.—The question for decision in this case is whether *25th Jany. 1878.* the Lahore Insolvency Court, upon a petition presented by Mr. R. Parker, who formerly carried on business at Umballa and Simla, had jurisdiction to adjudicate him an Insolvent.

Under Section 22, Act IV of 1872, the Lahore Small Cause Court has been invested with insolvency jurisdiction within a specified local area, *viz.*, within the area of its ordinary local jurisdiction, and, under Section 23 of the Act, any debtor or any creditor or creditors, provided the debts amount to Rs. 500 or upwards, may petition the Court having local jurisdiction that the debtor be adjudicated an insolvent.

The Act contains no express provision limiting the right to petition an Insolvent Court, to debtors or creditors who are resident within the local jurisdiction or to any other particular class of debtors or creditors, the words used in Section 23 being “any debtor” and “any creditor or creditors”; but it is evident, I think, that some limitation must be put on these general words, for otherwise the restriction of the Court’s jurisdiction to a specified local area would appear to be meaningless.

The question for consideration then is : What limitation did the Legislatnre intend to place on the admission by an Insolvency Court of petitions for adjudication when it restricted the local jurisdiction of the Court to a defined area ?

An examination of the law formerly in force in the Punjab in regard to insolvency, and which was superseded and replaced by the Insolvency Sections of Act IV of 1872, throws little light upon that question. Under the former law, the Courts exercised insolvency jurisdiction within specified local limits, *viz.*, within their respective districts, and the same difficulty was felt then as is felt now under Act IV of 1872 in determining whether a particular case came within the jurisdiction of a particular Court. In Bick’s case (*Punjab Record* for 1867, No. 64), which is in some respects analogous to the present one, the Chief Court held that the Delhi Insolvency Court ought to have dismissed the petition as the great majority of Bick’s creditors resided outside the Punjab, the bulk of the debts being at Calcutta, and Bick having come to Delhi to take the benefit of the Insolvency law there. And with reference to that case, the Chief Court issued a Book Circular (XIX of 1867) cautioning Insolvency Courts against the making of an adjudication too readily in cases where the insolvent petitioner may have contracted debts elsewhere, as well as within the jurisdiction of the Court; and it was expressly stated that an insolvent’s petition should be dismissed when the liabilities of the insolvent were contracted at Calcutta or elsewhere out of the Punjab.

There would seem, therefore, to have been no definite rule of guidance under the old law for determining under what circumstances an Insolvency Court should take jurisdiction in any particular case. So far as any rule can be deduced from the cases, it would seem that regard was had rather to the place where the liabilities were contracted than to the residence of the insolvent for the time being.

If we turn to the Code of Civil Procedure which was in force when the petition was filed in the present case, we find that Section 38, Act XXIII of 1861 provides that the procedure prescribed by Act VIII of 1859 is to be followed, as far as it can be, in all miscellaneous cases and proceedings; and Section 5 of the latter Act provides that the Civil Courts may try suits if (1) the cause of action shall have arisen within the limits of their local jurisdiction, or (2) if the defendant at the time of the commencement of the suit shall dwell or personally work for gain within such limits. With regard to the second of these tests, I think that the position of a debtor petitioning an Insolvent Court is not analogous to that of a defendant in a civil suit.

The provision as to dwelling in Section 5, Act VIII of 1859, seems to be intended for the convenience of the party against whom the aid of a Civil Court is invoked, and not for that of the person by whom it is invoked; and, therefore, if we were to apply the analogy furnished by Section 5, Act VIII to the present case, I think we should look not to the dwelling place of the petitioning debtor, but to that of the creditors.

The other test referred to in Section 5, Act VIII of 1859, viz., where the cause of action arose, may be applicable to a case like the present; but on the whole, I prefer to rely on the terms of Act, IV of 1872, itself, as I think it indicates sufficiently the cases in which the Legislature intended an Insolvency Court to exercise jurisdiction. Under the Act, a debtor who owes Rs. 500 or upwards is entitled to petition the *Insolvency Court having local jurisdiction* to be adjudicated an insolvent: I think the reasonable construction to be put on these words is that the debtor may petition the Insolvent Court of the place where he resides. Whether he would also be entitled to petition the Insolvency Court of the place where his debts were contracted is a question on which it is unnecessary in the present case to express an opinion as the petitioner owed no debts at Lahore. But I think it is clear that, if the petitioning debtor neither resides within the area of the Courts local jurisdiction nor owes debts there, the Court would not have jurisdiction to entertain the petition. It is urged for petitioner that as there are only three Insolvency Courts in the Punjab and as the areas of their local jurisdiction are very small, it is hard that debtors who neither reside nor owe debts at such places should be excluded from the benefits of the Insolvency law. It may be so, but that is a matter for the consideration of the Local Government, which has power under the Act to invest any number of Courts with Insolvency jurisdiction, and the fact that it has invested only three courts with such jurisdiction should not of course lead us to enlarge the jurisdiction of these Courts beyond what was intended by the Legislature.

If the view which I take is correct, it remains only to consider whether Mr. Parker, who owed no debts at Lahore, was residing within the local jurisdiction of the Lahore Insolvency Court at the time he filed his petition for adjudication. I think that there can be little doubt that he was not. His permanent place of residence is at Umballa, where his wife and family reside. He took a house at Lahore on rent some two or three months

before he presented his petition to the Insolvent Court, and he has occasionally during that period resided at Lahore for two or three days at a time. But his object in taking a house at Lahore was admittedly to bring himself within the jurisdiction of the Insolvency Court, and he admits also that he intends to return to Umballa as soon as he has obtained the protection of the Court. I consider, under these circumstances, that his residence at Lahore is merely colourable and not *bond fide*, and that it is not sufficient to authorize the Lahore Insolvency Court to adjudicate him an insolvent on his own petition. The case of *Tietkins* (I. B. L. R., O. C. J., 84) may be cited in support of this view.

I consider that this appeal should be dismissed with costs.

LOWDEN, J.—The facts in this case are not disputed. The petitioner applied to the Judge of the Insolvency Court at Lahore to be adjudicated insolvent under Section 23 of Act IV of 1872. He does not ordinarily reside in Lahore, nor were any of his debts incurred at Lahore: but before applying to the Court he had rented a house within the local limits of the jurisdiction of the Court and resided in it for a few days with the express object of being within the jurisdiction, for the sole purpose of being adjudicated insolvent. His ordinary place of residence, before he presented his petition, was and continues to be at Umballa where his wife and children are, and he has never carried on business at Lahore.

The question on appeal is whether the Judge rightly held that he had no jurisdiction to entertain the application on the ground that the petitioner did not reside within the local limits of his jurisdiction.

Strictly speaking only two questions arise. First.—Was the petitioner's residence, under the circumstances stated, sufficient to give jurisdiction to the Lahore Court.

Second.—If not, was the petitioner, as a resident of Umballa within the Punjab but without the local jurisdiction of the Court, entitled, under the circumstances stated, to present a petition under Section 23 of Act IV of 1872 to the Lahore Court.

I think these questions are to be answered by holding that a debtor seeking or sought to be adjudged bankrupt in pursuance of a petition presented under Section 23 of the Act must, at the time of the petition being presented, reside or carry on business within the local limits of the jurisdiction of the Insolvency Court to which the application is made, and that a debtor coming to reside temporarily within those limits for the express and sole purpose of being adjudicated insolvent, does not by such residence become subject to the insolvency jurisdiction of the Court.

To deal with the former of these propositions first. Section 22 of the Punjab Laws Act 1872 empowered the Local Government to invest any Court or class of Courts with insolvency jurisdiction in a specified local area.

This Act, it may be observed, extends only to the territories under the administration of the Lieutenant-Governor of the Punjab. Under this Section, the Small Cause Courts at Lahore,

Amritsar and Delhi have been invested with insolvency jurisdiction within the local limits of their respective jurisdictions as Small Cause Courts established under Act XI of 1865.

Section 23 enacts that any debtor whose debts amount to Rs. 500 or upwards; and any creditor or creditors to whom an aggregate sum of not less than Rs. 500 is due from any such debtor, may petition the Court having local insolvency jurisdiction that the debtor be adjudicated an insolvent.

Then the question arises: Which is the Court having local insolvency jurisdiction? By what test is it to be discovered or determined, in a particular case?

Unfortunately, there is in the Act no express provision on this point. All that can be gathered from the Sections quoted is that the Courts constituted under Section 22 are only to exercise their jurisdiction over the local area specified by the Local Government, and that a petition presented under Section 23, whether by the debtor or by a creditor or creditors, is to be presented to "the Court having local jurisdiction."

The Act being silent upon the point, except in the Sections quoted, which are not sufficiently explicit to answer the question which must arise upon every application made under Section 23, the Courts must answer the question upon such material as they can find.

In the case of *Guru Jowahir Sing*, which was in its circumstances very like that before us, a Division Bench of this Court held that Section 5 of Act VIII of 1859 must be held to supply the answer to the question under what circumstances an Insolvency Court had jurisdiction, being rendered applicable to such Courts by the provisions of Section 388 of Act VIII of 1859, to which might have been added Section 38 of Act XXIII of 1861.

It was in consequence of Mr. Justice Fitzpatrick doubting the correctness of this ruling that the present appeal was referred to a Full Bench: and I am disposed to hold that the rule there laid down cannot be maintained on the ground given. I think it is open to question whether an Insolvency Court is a Civil Court within the meaning of Section 388 and whether Section 38 of Act XXIII of 1861 would operate to extend to any Court Section 5 of Act VIII, which relates to the conditions of jurisdiction rather than to procedure proper. If, however, the latter Section does apply and operates to extend Section 5 to an Insolvency Court under Act IV of 1872, I should find no difficulty in applying Section 5 to a case where the first petition was presented by a debtor, as well as to a case where it is presented by one or more creditors of a debtor, seeing that by Section 38 the procedure of Act VIII of 1859 is to be followed only so far as it can be, and that the debtor is, in insolvency proceedings, substantially the defendant, by whomsoever the first step in the proceedings may be taken.

But it seems to me that the conclusion arrived at in *Jowahir Sing's* case, namely, that the debtor must at the time of presenting his petition reside within the specified local area of the jurisdiction of the Court applied to, is correct upon general principles.

Savigny in his *Private International Law*, in treating of Bankruptcy, after pointing out its peculiar nature, observes: "As the bankruptcy has in view an adjustment of the claims of a number of creditors, it is possible only at one place, namely, at the domicile of the debtor, so that the special forum of the obligation is here displaced by the general personal forum" (p. 209.) So, also, Dr. Phillimore in his work on *International Law*, volume IV, page 590, 2nd edn., says: "Bankruptcy—as it is well put by Savigny—supposes this state of things: a debtor unable to pay more creditors than one the full amount of his debt to them. In order to apportion this amount, his whole property must be collected into one mass or heap, be turned into money, and distributed according to certain principles amongst his creditors. As the object to be attained by this process is to deal with the claims and rights of various creditors, this can only be successfully accomplished at one place, and that place, it is obvious, ought to be the domicile of the debtor. This is a case, therefore, in which the *special* jurisdiction appertaining to the obligation itself must give place to the jurisdiction over the person of the obligor."

The same principle is followed in legislation on bankruptcy in England. There, when the debtor resides or carries on business in England, the Court having bankruptcy jurisdiction is the Court within the local jurisdiction of which the debtor resides or carries on business (32 and 33 Vic., Cap. 71, Section 59).

In the Indian Insolvent Act, which was passed in 11 and 12 Victoria, at Section 5 it is a necessary qualification of a petitioner who wishes to apply to the Court for relief on the ground of insolvency that he shall reside within the jurisdiction of the Supreme Court at the Presidency Towns.

Again, generally speaking in India, jurisdiction in suits (other than suits relating merely to immoveable property) is determined either by reference to the residence of the defendant or to the place where he carries on business or to the place where the cause of action arose. Now, a bankruptcy proceeding is of such a character that it would be practically impossible to found jurisdiction over it with reference to anything that could be called a "cause of action," as is virtually declared by the authors above quoted and admitted in legislation on the subject. Further, the insolvent debtor is in a position analogous to that of a defendant, he is the person against whom relief and execution of process are sought and granted to the creditors, whether the proceedings be commenced at their instance or at his, to the fullest extent that circumstances permit.

When, then, we find the Legislature providing for the institution of Courts with insolvency jurisdiction "within a specified local area," and that the petition for adjudication is to be presented to "the Court having local insolvency jurisdiction", there being in fact several Courts with such jurisdiction within a limited local area, it seems to me that we are bound to hold on principle and by analogy that the place in which the debtor resides or carries on business is one of the tests or conditions, if not the only possible one, of the jurisdiction.

Then taking this locality to be the test, generally, it is obviously beyond the intention of the Act to give the Provincial Insolvency Courts jurisdiction over insolvents not residing or carrying on business within the Punjab, and it was I think admitted at the hearing that this is so.

Then, can it be said that any debtor residing or carrying on business within the Punjab is subject to the jurisdiction of an insolvency Court in the Punjab, within whose limits he does not reside or carry on business, there being no Court which has a local jurisdiction extending over the whole Province? I think clearly not, for to hold this would be in effect to extend the local area of the jurisdiction specified by the Local Government for such Courts.

It follows of necessity that, to give jurisdiction, the debtor must reside or carry on business within the local limits of the jurisdiction of the Court to which the application under Section 23 is made.

It was urged that unless we hold that any debtor resident in the Punjab may apply to the Insolvency Courts established, it would be a great hardship to the debtor. This may or may not be so, but the remedy lies with the Local Government, which can erect Courts, if it thinks proper to do so, so that there shall be an insolvency jurisdiction throughout the Province. This objection, however, cannot affect the question as to whether a Court with a limited local jurisdiction has jurisdiction over debtors not residing or carrying on business within its limits. This may be made plain by supposing, as might be the case, that every District Court had insolvency jurisdiction under Section 22 of the Act within its own limits. It could not be doubted then, as it seems to me, that the Court indicated in Section 23 would be the Court of the District in which the debtor resided or carried on business. Now, suppose the insolvency jurisdiction taken away from one of these District Courts. Could it be said that the debtors in that district became thereby subject to the insolvency jurisdiction of any one or more of the other District Courts? Surely not, but only that there was no Insolvency Court "having local jurisdiction" to which the debtors of the deprived district could resort. And this, as it seems to me, is precisely how the case now stands in regard to debtors not carrying on business or residing within the local jurisdiction of the existing Insolvency Courts in the Province.

Having stated my reasons for the answer above given to the more general of the two questions proposed, it only remains to give reasons for my answer to the other question, namely, whether there was, upon the facts stated in this case, a sufficient residence to give jurisdiction.

Taking the rule to be that a debtor may, under Section 23, petition the Insolvency Court within whose jurisdiction he resides at the time, I do not think we can hold that a person who has taken up his residence within these limits temporarily for the sole and express purpose of presenting the petition can be said to reside within the jurisdiction, within the meaning of the rule.

The Legislature seems to have contemplated that Insolvency jurisdiction under the Act might be partial, that is, established in some places and not in others or in all. This view has been adopted and acted on by the Local Government which has chosen, in its lawful discretion, to establish Courts only at the three principal centres of trade in the Province and not elsewhere, having power, if it be so minded, to cover the Province with such Courts. The Government has however discontinued or refused to continue this jurisdiction in other places in the Punjab where it was formerly exercised. Looking to these facts, and holding the view above expressed, I think we should be giving effect to views opposed to the intention of the Legislature and in conflict with the legitimate action of the Local Government, if we were to hold that a colourable residence sufficed to give jurisdiction to a Court over a debtor not residing or carrying on business within the area specified by Government. We should be aiding debtors all over the Province in demanding, if they were so minded, as a common right, that which, as it seems to me, is at present conferred as a special privilege, incidentally to a scheme designed to meet the probable requirements and convenience of a limited portion of the inhabitants of the Punjab. If this application be granted, there is no reason why the insolvent traders of all the unprivileged towns of the Punjab should not, if they desire to have their affairs wound up through a Court, flock to Lahore, Amritsar, and Dehli and swamp the Courts in these places with Insolvency business. I do not think we should be justified in giving a decision that opens the door to such possible consequences, when there is a remedy provided by the law empowering the Local Government to cover the whole surface of the Province with Courts having insolvency jurisdiction.

Of the cases cited at the argument in the case of *Tietkins* (I. B. L. R., O. C. J. 84) and in the case *ex parte Hains re Bianconi* (9 L. T., N. S. 847) which is exactly in point, decided under analogous Statutes in England and this country, a similar residence was held not to be sufficient to subject the debtor to the jurisdiction. These cases, dealing as they do with the question of residence as the foundation of jurisdiction in an Insolvency Court, have more weight than the cases cited relating to residence for other purposes. Lastly, there is not that degree of permanency in the occupation of the house under the circumstances stated that is essential to "residence" as generally understood in connection with jurisdiction.

The answer above given to the two questions proposed is wider than is absolutely necessary to dispose of this case, for which purpose it is sufficient to say that a debtor who does not reside or carry on business and who owes no debts within the local limits of the jurisdiction of the Insolvency Court to which he applies under Section 23 of the Act, is not entitled so to apply, and does not become entitled by coming to reside temporarily within the jurisdiction with the sole and express object of making such application.

Whether he can apply to a Court within whose jurisdiction he owes debts is a point that cannot be considered to be decided

by the opinion above expressed, nor the connected point whether a debtor residing within the jurisdiction of a Court, but whose debts are owing in whole or in the greater part outside the Province can insist upon the benefit of the Insolvency jurisdiction under the Act merely by reason of such residence.

Concurring with my colleagues, I consider this appeal should be dismissed with costs.

No. 35.

APPELLATE SIDE.

DURGA DAS AND NARAIN—(Plaintiffs),—APPELLANTS,

Versus

BELI MISR—(Defendant)—RESPONDENT.

Case No. 1310 of 1877.

(LINDSAY AND PLOWDEN, JJ.)

Contract Act (IX of) 1872, Section 265—Suit to wind up a partnership business—Jurisdiction—District Court—Extra Assistant Commissioner's Court.—Plaintiffs, representatives of a deceased partner in a business carried on in Calcutta, instituted a suit for an account in the Court of the Extra Assistant Commissioner at Amritsar. *Held* that the suit was one to have the partnership business wound up, and fell within the terms of Section 265 of the Contract Act, IX of 1872.

Held further, that the Extra Assistant Commissioner had no jurisdiction, such a suit being triable only by a Court not inferior to the Court of a District Judge; and that, as the principal place of business of the firm was in Calcutta, the Amritsar Courts had no jurisdiction.

Regular appeal from order of Additional Commissioner, Amritsar, dated 22nd May 1877.

Kali Prosono Roy for Appellants.

Spitta for Respondent.

The plaintiffs brought this suit for an account. The defendant pleaded that the Amritsar Court had no jurisdiction to entertain the suit.

The plaintiffs' father, Dharee Lall, and the defendant carried on business in partnership at Calcutta as brokers for the sale of *pushmina* goods. They originally were residents of Amritsar, and defendant's father and brother still reside in Amritsar. Defendant's wife and children reside at Amritsar, though they occasionally proceed to Lahore on visits to her relations there. Defendant left Amritsar some 8 or 9 years ago, and, in partnership with plaintiffs' father, started a brokerage business there, and carried it on there continuously ever since. His permanent place of residence was in Calcutta. Plaintiffs' father, Dharee Lall, died about the end of the year 1873, and the partnership was then dissolved. On the 5th May 1874, the plaintiffs executed a *mukhtarname* appointing their maternal uncle, Dhanpat, to be their *mukhtar* to proceed to Calcutta to receive their share of the partnership property and to

settle the partnership accounts. Plaintiffs alleged that Dhanpat failed to settle the accounts. In *Sawan* 1933, the defendant came from Calcutta to Amritsar on a temporary visit for the purpose of celebrating the marriage of his son ; and the evidence showed that he remained for this purpose at Amritsar from about the 25th *Sawan* (7th August) till the beginning of *Asouj* (say 15th September). The plaintiffs took advantage of the opportunity offered by defendant's presence in Amritsar to bring the present suit on the 22nd August 1876. The Court of first instance decreed the claim.

The Additional Commissioner on appeal, after briefly stating the facts as above, gave judgment as follows :—

“The question which arises for decision is whether the Amritsar Court has jurisdiction. It is admitted by plaintiffs’ pleader that the cause of action did not arise within the local jurisdiction of the Amritsar Court. The question is whether defendant can be said to have been “dwelling” within such jurisdiction on the 22nd August 1876 when the suit was brought. I do not think that he can. He was here only on a temporary visit. His permanent dwelling was at Calcutta, and he intended to return there at once when the business for which he came was accomplished. It is true that defendant’s wife and children reside at Amritsar, and if defendant could be considered as only temporarily absent from Amritsar (for instance on an itinerant expedition for the sale of goods), I should hold that his dwelling must be considered to be where his wife and children reside. But as already stated, defendant’s permanent place of residence is at Calcutta, and whenever he comes to Amritsar it is only on an occasional visit and for a brief period. The evidence does not show how often defendant visits Amritsar or the usual duration of his visits ; but there is no reason to believe that his visits are frequent or of long duration.

The plaintiffs’ pleader has asked me to remand the case for further evidence in regard to these points, but seeing that the objection as to the jurisdiction of the Amritsar Court was taken from the first and that ample opportunities were given to both parties to produce whatever evidence they wished to offer on the point ; I do not think I should be justified in remanding the case, especially as I have no reason to think that the complexion of the case would be materially altered if an opportunity were given for the production of further evidence.

I accept this appeal, and cancel the decision of the Lower Court, and dismiss this suit for want of jurisdiction in the Amritsar Courts. The plaintiffs must pay defendant his costs throughout.”

From the above order, the plaintiffs appeal to the Chief Court.

The judgment of the Chief Court was delivered by

LINDSAY, J.—This is in substance a suit by the representatives of a deceased partner in business carried on in Calcutta to have the business wound up, and it falls within the terms of Section 265 of the Contract Act. Such a suit must be lodged in a Court not inferior to the Court of the District Judge within the local limits of whose jurisdiction the place or principal place of business of the firm is situated. Now the place of business was Calcutta, 31st Jany. 1878.

There is no place of business in Amritsar, nor had the Extra Assistant Commissioner authority to entertain the suit.

The appeal is dismissed with costs.

No. 36.

APPELLATE SIDE. {	THAKUR DAS,—(Objector),—APPELLANT,
	<i>Versus</i>
	DYA RAM,—(Applicant),—RESPONDENT.

Case No. 1191 of 1877.

(LINDSAY, PLOWDEN AND SMYTH, JJ.)

Act XXVII of 1860—Certificate under, for collection of debts—Rival claimant, enquiry into and adjudication upon title set up by.—D. R., the eldest son of H. R. deceased, applied for a certificate under Act XXVII of 1860, to enable him to collect the debts due to his deceased father. The application was opposed by T. D. the younger son of H. R. deceased, who claimed a certificate under a will alleged to have been executed by H. R., the genuineness and validity of which was disputed by D. R. The Court (Judicial Assistant) refused to take evidence as to the genuineness and validity of the will, and granted a certificate to D. R. as eldest son of H. R. deceased, subject to his furnishing security.

Held by Plowden and Smyth, JJ. (Lindsay, J., dissenting) that the Court was bound to go into the question of the genuineness and validity of the will.

An objector claiming a certificate under Act XXVII of 1860 under a will, is entitled to have an enquiry into and adjudication upon the title which he sets up, before a decision by the Court as to which claimant should get the certificate.

Appeal from the order of Judicial Assistant Commissioner, Lahore, dated 14th July 1877.

Spitta and Rivaz for Appellant.

Rattigan for Respondent.

This was an application made by Dya Ram, the eldest son of Hurjus Rai, deceased, for a certificate under Act XXVII of 1860 to enable him to collect the debts due to the estate of his deceased father.

The application was opposed by Thakur Das, the younger son of the deceased by another wife, who claimed the certificate by virtue of a will alleged to have been executed by the deceased, and by which he was constituted manager of the estate.

Dya Ram objected that the will was not genuine or valid, and the Judicial Assistant refused to take evidence upon it on the ground that it would be waste of time to do so in a proceeding for the grant of a certificate. As Dya Ram was the eldest son of the deceased, he granted the certificate to him subject to his furnishing security.

From this order Thakur Das appealed to the Chief Court.

Spitta, for the appellant, contended that it was the duty of the Court to enquire into the will and not disregard it on mere allegations of forgery made by objectors.

Rattigan, for the respondent, contended that, as it is not the object of Act XXVII of 1860 to adjudicate upon contested questions of title, and as the will in the present case was disputed, the Court was right in granting the certificate to the eldest son of the deceased.

The following judgments were delivered :—

SMYTH, J., (after shortly stating the facts, continued). There *30th Jany. 1878.* is no doubt, I think, that it was never intended that Act XXVII of 1860 should be made use of as a means by which rival claimants might obtain indirectly an adjudication upon disputed questions of right or title to succeed to the property of deceased persons. The real object of the Act was simply to provide security for persons paying debts to the representatives of deceased persons and to facilitate the collection of such debts. For this purpose, the Act provided that no debtor of a deceased person should be compelled to pay his debt to any person claiming to be the representative of the deceased unless such person produced a certificate to be obtained in the manner provided in the Act. Where there are contending claimants for such certificate, the Act (Sec. 3) provides that the Court "shall determine the right to the certificate and grant the same accordingly." Now, it is difficult to see how a Court can determine a question of right unless it has the facts before it on which such determination depends, and when the facts are disputed, I think an enquiry of some sort (in some cases having regard to the nature of the proceeding, a very summary one may be sufficient) should be made for the purpose of ascertaining them. One learned Judge went so far as to say in a case reported at page 171 of Volume II, *Suth. Weekly Reporter* that: "A Judge who has to make an order under Section 3, Act XXVII of 1860, must be as fully satisfied and must make as complete an enquiry for the purposes of that order as would be necessary in respect of any other matter which had to be proved before him in a civil suit or otherwise." However that may be, I think, when a special title to the certificate is set up against the legal heirs, and such title is impugned by the heirs, an issue should be fixed as to the validity of the title, and the parties should be allowed to adduce their evidence upon such issue, and the Judge should come to a finding upon it. Of course, such finding would not be conclusive upon the question of title. It would still be open to any party to bring a separate suit to establish his rights. And this seems to be the view supported by all the cases to which I have been able to refer. In a case reported at page 4 of *Suth. W. R.* for 1864, *Mis. Rulings*, it was held that the executor under a will, if it be not contested, has an undoubted right to a certificate under Act XXVII of 1860, though he be not the legal heir; while, if the will is contested, the Judge should enquire into its validity, and if he considers it proved, should give a certificate, leaving the parties dissatisfied, to set it aside by a regular suit. Other cases to the

same effect are reported at p. 25 of the same volume; IV Suth. W. R. Mis. 19; IV B. L. R., A. C., 149; XI Suth. W. R. 388; and XVII Suth. W. R., 277. In the case last cited, which was decided by Macpherson and Dwarka Nath Mitter, JJ., the applicant claimed under a will. The Judge did not decide whether the will was executed or not, but gave the certificate to the widow of the deceased upon her furnishing security. The Court held that this was not the proper way of disposing of the matter, and that, as the applicant claimed the certificate by reason of the will, he was entitled to have the Judge's decision on the issue raised by him, and the Judge must say whether under the will he has a preferable right. The case was accordingly remanded to the Judge for decision on that point.

I have not been able to find any cases where a Judge was held to have acted rightly in refusing altogether to go into the question of a special title set up by a claimant when such title was impugned by the legal heirs. The cases cited by Mr. Rattigan do not go to that extent. The case at p. 174 of XVII W. R. merely decided that a Court properly exercised its discretion in refusing to recall a certificate already granted because there was an heir in a nearer degree to deceased than the person to whom the certificate had been granted; and the case in XIII W. R. p. 356 does not touch the question now raised. The other case quoted from 2 Hay's Rep. 299, I have not been able to refer to.

I do not, however, wish to be understood as holding that a Court has no discretion as to the person to whom a certificate should be granted. It has in my opinion a large discretion in the matter, but it must be soundly and judicially exercised, and I do not consider it can be said to be so exercised when the material facts being in dispute, no attempt has been made to ascertain them by enquiry or by allowing the parties to adduce evidence. But if, after enquiry, the Judge should not be fully satisfied as to the genuineness or validity of a will under which a certificate is claimed, I think he would exercise a sound discretion in refusing to grant the certificate to the person claiming under the will and in granting it to the legal heir upon such terms as to security or otherwise as might be deemed proper under the circumstances of the case. So, where there are joint claimants under the same title at feud with each other, I think the Court would act wisely in granting the certificate to one alone, for as they probably would not unite in making a joint demand for the debt or in bringing a suit for it, there would be risk of loss to the estate if the certificate were granted to them all jointly. So, also, if a doubtful question of law were raised as to the validity of a will, the Judge might be held to exercise a sound discretion in granting the certificate to the legal heir. It was upon that principle that the decision in case No. 69 in *Punjab Record* for 1869 was based.

I think this appeal should be accepted and the case remanded to the Lower Court with instructions to frame an issue as to the genuineness and validity of the will, and to receive such relevant evidence as the parties wish to adduce on that issue, and thereupon to determine who is best entitled to the certificate. Costs of this appeal to be costs in the cause.

LINDSAY, J.—In my opinion Mr. Bullock was not bound to go into the factum of the will, nor into the validity of the will: those are very difficult questions. *30th Jany. 1878.*

The Act does not require him to consider all evidence that may be produced: he has to determine summarily and for the purpose of the Act the claims of the parties, and I cannot say he acted illegally in choosing the eldest son of the deceased in preference to a younger son by another mother, though that son produces a will in his favor.

The Act is intended to facilitate the realization of the debts of a deceased person and to protect debtors who pay. By Section 3, where there are two or more claimants for the certificate, the Court must determine the right to the certificate and grant the same accordingly. That certificate is conclusive of the representative title against all debtors of the deceased, and affords full indemnity to all debtors paying their debts to the certificate-holder.

And by Section 5 the Court may take security from the person to whom a certificate is given for rendering accounts of debts received by him, and for the indemnity of any person or persons who may be entitled to the whole or any part of the money received by the certificate-holder by virtue of such certificate, and whose right to recover the same has been established in a regular suit.

It is contended that the right to the certificate cannot be determined without enquiry into the basis of the claims of the various claimants, if there be rival claimants. This is true to a certain extent, but when the ground set forth as the basis of a rival claimant's right is the factum and the validity of a will, both of which facts are denied by his elder brother, the eldest son of the deceased, I think the Court was quite right in using its discretion in favor of the eldest son, naturally the man to whom a certificate should be given, and in directing the younger brother, the holder of the will, to prove its genuineness and its validity in a regular suit.

To have made a superficial enquiry on those questions would have been a mere waste of time; and to have gone fully into the difficult questions raised would have taken considerable time, and perhaps have been the cause of claims for money being barred by lapse of time, thus causing injury to the successors to the estate of the deceased.

Taking into consideration the object of Act XXVII of 1860, and the large discretionary power left to the Court, I think the Judicial Assistant in *this particular* case exercised a wise discretion. I am aware that there are a great number of decisions that go the length of declaring that the Court must thoroughly investigate and determine the rights of rival claimants, and particularly when a claimant bases his claim on a will left by the deceased; but there is, as pointed out by Mr. Rattigan, authority for a contrary view. When there has been a thorough enquiry on all points, and the questions have been *finally* determined on appeal by this Court, the object of a regular suit has been fulfilled. Now,

it was not the intention of the Legislature, in my opinion, that under the Act these lengthy proceedings should take place.

In consequence of the above difference of opinion, the following question was referred to a Full Bench:—

“The point referred is whether, under the circumstances of this case, Mr. Bullock was right in refusing to fix an issue as to the genuineness and validity of the will and to take evidence thereon.”

At the hearing before the Full Bench

Rivaz appeared for the Appellant and Rattigan for the Respondent.

The following judgments were delivered:—

4th Feby. 1878.

FLOWDEN, J.—I concur generally in the reasoning and conclusion arrived at in Mr. Justice Smyth's judgment. I think that the objector claiming a certificate under the will was entitled to have an enquiry into and adjudication upon the title which he set up, before the Court finally decided to which claimant the certificate should be granted. The language of the Act in Section 3 and again in Section 6, which empowers the Court of appeal to direct “a further investigation”, seems to me to require that enquiry shall be made into the merits of rival titles, and the weight of authority seems to support this view of the intention of the Act. The precise issues to be laid down will depend in each case upon the statements of the claimants: but it does not appear upon the record that any question has yet been raised in this case as to the validity of the will, if its genuineness be established. Upon the statements recorded, I think the Lower Court ought to have settled and tried an issue as to the genuineness of the will, before deciding which of the persons before it was best entitled to the certificate.

4th Feby. 1878.

LINDSAY, J.—I adhere to the opinion expressed in my order of reference, dated 30th January 1878.

4th Feby. 1878.

SMYTH, J.—I adhere to the opinion expressed in my order of reference, dated 30th January 1878.

The case having been remitted back to the Division Bench, was remanded to the Court of Mr. Bullock to determine the genuineness of the will upon which the appellant rested his claim for a certificate.

No. 37.

APPELLATE SIDE. {	MUSST. RAJADAN AND DANA,—(Defdts.),—APPELLANTS,
	<i>Versus</i>
	UMRA AND OTHERS,—(Plaintiffs),—RESPONDENTS.

Case No. 847 of 1877.

(LINDSAY AND FLOWDEN, JJ.)

Village proprietor without male issue—Gift to daughter's son—Custom.—Raiens of Hoshiarpur district.—Found that no custom existed amongst the Raiens of the Hoshiarpur district which precluded a village proprietor without male issue from making a gift of all his property to his daughter's son.

Regular appeal from the order of the Additional Commissioner, Jullundur Division, dated 3rd April 1877.

Claim to declaration of right in ten bigas, ten biswas of land situated in mouzah Dogri, tahsil Dasuha, Zilla Hoshiarpur.

LINDSAY, J.—The question to be determined is whether amongst the Raiens of the Hoshiarpur District, the owner of property without male issue may make a gift of all his property to his daughter's son. *15th Feby. 1878.*

The first Court found the custom proved. The Commissioner took a different view. It has been ruled that amongst the Raiens of the Jullundur District, the District adjoining Hoshiarpur, no custom existed whereby a childless man could be restrained from making a gift of his entire property, *Haji and Shadi v. Gazi No. 1105 of 1866*, "*Notes on Customary Law*," 70.

The custom that obtains among the Raiens of Jullundur may be held to obtain among their brotherhood in the Hoshiarpur District. The case of *Bahadur v. Basaki*, Jullundur, is also cited in the "*Notes on Customary Law*," as supporting the view that such gifts may be made.

The *wajib-ul-arz* applicable to the village in suit does not preclude the gift made by the deceased to his daughter's son.

I would uphold the first Court's judgement.

PLOWDEN, J.—I concur in the proposed order.

In view of the reported decisions in the *Punjab Record* for the past 12 years, No. 77 of *P. R.* 1869. No. 42 of *P. R.* 1875. I think it can be
 „ 55 of Do. 1870. „ 39 of Do. 1876. I think it can be
 „ 46 of Do. 1871. „ 2 of Do. 1877. hardly said that an
 „ 33 of Do. 1872. „ 23 of Do. „ alienation by a
 „ 40 of Do. 1872. „ 43 of Do. „ sonless proprietor
 „ 26 of Do. 1875. „ 81 of Do. „ of a portion of ancestral land to his daughter's son is opposed to general custom in the Punjab. The usage as to the recognition of gifts by sonless proprietors, is variable and unsettled—the power to make gifts being recognised in some places or tribes, and not in others. There is a presumption against the existence of such a power; but the force of the presumption is also variable.

The question then is, whether the power of making such gifts as that in question, is sufficiently shown to be recognised by local usage. Upon the whole, I think it is. The *wajib-ul-arz* is not opposed to the practice and several instances of such gifts being made and passing unchallenged or being upheld, have been established; none of the local decisions referred to by the Additional Commissioner are inconsistent with the alleged usage, while one supports it.

The expression of some witnesses of an opinion that such gifts should not be recognised in future, is strong as involuntary and unconscious testimony to the prevalence of the usage. It may be a departure from primitive custom; but all customs are subject to modification and change.

I think the presumption, such as it is, against the validity of a gift of the kind in suit among the Raiens of the Hoshiarpur District has been sufficiently rebutted by the evidence recorded, there being no settled custom, generally prevalent, on the point among agriculturists in the Punjab.

The Commissioner raises a question as to the completeness of the gift.

Possession is said to have been held by Elahiya, father of the minor donees, but the Commissioner states that the record shows he died eleven years before suit. I am unable to find the evidence on which this finding is based: and I think the Commissioner may have confounded Elahiya with Alla Din, common ancestor of the parties, who died about that time.

The evidence of the patwari and the statements of Mussamat Rajadan and Gamoo (who appears to be Elahiya himself under another name) in the *dakhil kharij* proceedings clearly show, if true, that Gamoo who describes himself as father of the two minors, who are described as sons of Elahiya in the deed and in the plaint, got possession before the late proprietor's death on his minor son's behalf.

This evidence satisfied the first Court and is not rebutted, and may therefore be accepted by this Court also.

The appeal is accepted, and the first Court's order restored with costs throughout to defendants.

No. 38.

SHERA,—(Plaintiff),—APPELLANT,

Versus

QUTBA & ALMAN,—(Defendants),—RESPONDENTS.

Case No. 1783 of 1877.

(PLOWDEN AND SMYTH, JJ.)

APPELLATE SIDE.

Absentee—Abandonment.—F. and A. were absentees at first Settlement and their land was entered in possession of defendants, with an agreement to restore the land to the absentees on their return. At second Settlement, defendants again agreed to restore the absentees' land when they returned. After Settlement, defendants divided the land. The absentees, who were living 18 koss from the land in suit, never returned.

In a suit by S, son of F. and nephew of A., to recover the land, *held*, affirming the order of the Commissioner, that F. and A. had abandoned the land, and therefore, that S. had no claim.

Long absence by an absentee, who, though residing near the land, takes no steps to assert his claim, raises a strong presumption that the absentee has relinquished all claim to the land recorded in his name, and this presumption is not affected by the conduct of those who permit the absentee's name to be borne in the Settlement papers.

Civil Judgment No. 78 *Punjab Record* 1875, approved and followed.

Regular Appeal from order of the Commissioner, Rawalpindi Division, dated 25th June 1877.

The facts are sufficiently stated in the judgment of the Chief Court which was delivered by

PLOWDEN, J.—The plaintiff claims as the son of one Fakira, 16th April 1878. and nephew of one Amira, co-sharers in certain lands in the possession of the defendants, the sons of Kamma, deceased.

It appears from an entry in the *shijra naseb* of the last Settlement, that Amira and Fakira had then, that is in 1867, been absent for a period of 50 years. Their names had been entered as *gairhazran* at the first Settlement, and a promise by Kamma and Jewaya was then recorded to restore them their share of the joint *khata* on their return. At the second Settlement, Kamma and Jewaya expressed their willingness that the names of Amira and Fakira should remain recorded in the Settlement papers.

Recently, Shera, the plaintiff, has claimed a share of the land on the allegation that his father and uncle are dead. The first Court made a decree in his favour, against both the sons of Kamma in this suit, and against Jewaya in a separate suit. The Commissioner has reversed these decisions holding that "the land had been abandoned by the absentees, who had left the village more than 50 years ago and had never since taken any steps to keep alive their claim to this land."

We consider that the Commissioner was justified in drawing this inference from the facts of this case. An absence of this kind for so long a period raises a strong presumption that the absentee has relinquished all claims to his land, and this presumption is not affected by the conduct of those who permit the absentee's name to be borne on the Government papers.

The plaintiff admits that his father and uncle lived and cultivated land in Hamirpur, 18 koss distant from the native village, and it is clear that they died there without returning to the village, or taking any steps, so far as appears in evidence, to protect their rights, or even to ascertain that they were recognised.

The case is very similar in its circumstances to No. 78 of 1875 where a son, suing shortly after his father's death, was held to have no claim on the ground that his father had abandoned the land, he having been for many years absent and having died without returning; and an entry in the settlement record continuing a promise to restore the land on the plaintiff's father's return was held not to affect the decision of the suit.

Following the principle of that decision (which has been recognised in other cases) we uphold the Commissioner's order dismissing the suit on the ground that the absentees had abandoned their share in the land, and that the plaintiff has therefore no ground of claim.

The appeals in this case and in No. 1038 of 1877 are accordingly dismissed with costs.

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No. 39.

MAMU,—(Defendant),—APPELLANT,

Versus

KARM BAKHSH, MIRAN BAKHSH AND KURIA,—

(Plaintiffs),—RESPONDENTS.

} APPELLATE SIDE.

Case No. 363 of 1877.

(LINDSAY AND PLOWDEN, JJ.)

Custom—Mahomedan Sheiks—Childless village proprietor—Ancestral property—Gift to daughter's son.—Found that custom precluded a childless village proprietor from making a gift of his ancestral property to his daughter's son, in the presence of nephews.

Special appeal from order of Commissioner, Umballa Division, dated 14th December 1876.

The parties to this suit were Mahomedan Sheiks of mauza Bheri, Tahsil and Zilla Umballa.

The defendant, Mamu, his sons having died, made a gift of all his property, including ancestral landed property, in favour of his daughter's son, Barkat, but retained possession of the property.

Plaintiffs, nephews of defendant, sued for cancellation of the deed of gift on the ground that it was opposed to custom.

The defendant pleaded that he had brought up the donee as his son; but the Court of first instance overruled this plea, finding that the defendant had had male issue, his last son having died 10 years previous when the donee, Barkat, was 15 years old.

On the question of custom, the Court found on enquiry that a gift of ancestral property in favour of a daughter's son or sister's son was invalid in the presence of near male collateral heirs.

From a report of the record-keeper it appeared that such gifts had generally been set aside in the neighbouring villages, though upheld in two or three villages under certain special circumstances. The record-keeper further reported that in the village of Bheri, where the donor lived, and in seven of the neighbouring villages, a gift in favour of a daughter's son or a sister's son was prohibited by the *wajib-ul-urz*.

The Court of first instance, on the above findings, cancelled the deed of gift in respect of the ancestral landed property of the donor, but maintained it in respect of his moveable property and dwelling house.

The Commissioner, on defendant's appeal, maintained the order of the first Court, on the ground that the investigation showed that the proposed gift was contrary to the terms of the village administration paper and to the custom of the neighbourhood.

The defendant accordingly appealed to the Chief Court. The judgment of the Court was delivered by

28th May 1877.

LINDSAY, J.—We think this appeal should be rejected. The allegation is not adoption, but that the donee was brought up by the donor as his son from infancy: now up to 10 years ago the donor had a son and at that time the donee was 15 years old.

The appellant's case is based entirely on the fact, that the donee being to him in the light of a son and so from his infancy, he is empowered to make the gift.

The *wajib-ul-arz* is against such a gift. The facts of the case, as accepted by the Courts, do not permit the appellant to make the gift of ancestral land to a daughter's son in the presence of collaterals.

No. 40.

ALADIN AND UMRDIN,—PLAINTIFFS,

Versus

JOWAYA AND MAHOMED BAKHSH,—DEFENDANTS.

REFERENCE SIDE. {

Case No. 17 of 1877.

(PLOWDEN AND SMYTH, JJ.)

Civil Procedure Code (Act X of 1877) Section 617—Reference in suit pending when Act X of 1877 came into force—Reference in case open to appeal.—Plaintiffs instituted on 8th August 1877 a suit to cancel one of two decrees passed against them for Rs. 40 in respect of the same cause of action. On 12th November 1877, the Court of first instance referred certain questions of law arising in the suit, for the decision of the Chief Court, under Section 617, Act X of 1877. *Held* that, as the suit was instituted before 1st October 1877 (the date on which the Act came into force) the procedure prior to decree was not governed by Act X of 1877 (*vide* last clause of Section 3), and Section 617 did not apply.

Per SMYTH, J.—Held further, that the reference was not authorized by Section 617, Act X of 1877, even if the suit had been instituted after 1st October 1877, as any decree which might be passed in the suit would not be final.

Case referred by Mahomed Barkat Ali Khan, Khan Bahadur, Extra Assistant Commissioner, Lahore, under Section 617 of the Civil Procedure Code (Act X of 1877).

On 15th December 1876, Jowaya instituted a suit against Aladin for Rs. 40 due on the mortgage of a house. The defence was that Mahomed Bakhsh, son-in-law of Jowaya, was mortgagee and that Jowaya had no right to sue.

Mahomed Bakhsh on 12th January 1877 applied to be made a party, but his application was rejected.

On 9th February 1877, however, Mahomed Bakhsh was made a defendant as he was in possession of the mortgaged house.

On 27th February 1877, Balwant Singh, Munsiff of Lahore, decreed possession of the mortgaged house to Jowaya against Aladin and Mahomed Bakhsh.

On 22nd March 1877, Aladin and Mahomed Bakhsh appealed to the Judicial Assistant, who, on 5th April 1877, modified the order of the Munsiff and gave Jowaya a simple money decree for Rs. 40 against Aladin, with costs of both Courts.

No further appeal was preferred in this case.

On 9th July 1877, Mahomed Bakhsh sued Aladin for Rs. 40 on an alleged mortgage of September 1874 in the Lahore Small Cause Court.

On 18th July 1877, a decree was passed on Aladin confessing judgment.

On 8th August 1877, the present suit was instituted by Aladin and Umrudin against Jowaya and Mahomed Bakhsh. The plaintiff alleged that two decrees for mortgage money were passed, while in fact there was but one mortgage; and it was prayed that either of the above decrees might be cancelled, it being stated in the plaint that Mahomed Bakhsh's decree was really the correct one.

The Extra Assistant Commissioner, under Section 617 of the Civil Procedure Code, referred certain questions of law for the decision of the Chief Court.

The following judgments were delivered.

SMYTH, J.—If the suit was instituted before the 1st October 15th Decr. 1877, 1877, then the procedure prior to decree is not governed by the new Code of Civil Procedure (*vide* last clause of Section 3 of the Code), and Section 617 does not apply to it.

If the suit was instituted on or after 1st October 1877, the procedure is governed by the new Code, but the Extra Assistant Commissioner is not authorized under Section 617 of the Code to make a reference to the Chief Court in this case, as any decree which he may make in it would not be final. He should dispose of the case himself, leaving any of the parties who may be dissatisfied with his decision to appeal in due course.

PLOWDEN, J.—I would merely point out that this reference is not authorized by Section 617 of the Code, as the suit was instituted before the new Code came into force, and any decree made in it by the Extra Assistant Commissioner will not be final, but open to appeal in the ordinary course.

I think at this period it is not necessary to draw attention to the corresponding provision in Act XXIII of 1861 which will soon be obsolete, and the construction of which is doubtful.

No. 41.

APPELLATE SIDE. { MUSSAMMAT FAHIMULNISSA AND HAJI KUTUB-UD-
DIN,—(Defendants),—APPELLANTS,
Versus
MAHOMED HUSSAIN,—(Plaintiff),—RESPONDENT.

Case No. 1681 of 1877.

(LINDSAY AND SMYTH, JJ.)

Mahomedan Law—Restitution of conjugal rights—Adultery of husband—Violation of marriage contract.—In a suit for restitution of conjugal rights, it was pleaded (among other grounds) that plaintiff had lost his rights by reason of his adultery. *Held* that the fact of plaintiff having had sexual intercourse with prostitutes during the absence of his wife, she persistently for years having refused to live with him, was not so gross a violation of the marriage contract as to disentitle plaintiff to the custody of his wife.

Special appeal from order of Commissioner and Superintendent, Delhi Division, dated 31st October 1877.

Spitta for Appellants.

Rattigan for Respondent.

The facts are fully stated in the following judgments which were delivered by the Chief Court.

25th Jany. 1878. LINDSAY, J.—The plaintiff seeks to recover his wife who refuses to live with him. He obtained a decree. The facts found by the Judicial Assistant, the first Court, are:—

1. That the husband and wife are people of hasty temper; that they quarrelled and had disputes, and that the wife did not care one way or the other for her husband; that she was ready to leave him if incited to do so by her friends; that if she had been happy and contented she would not have left her husband solely on the instigation of her father.

2. That in April 1872, there was a dispute between the husband and his father-in-law regarding a pre-emption case, and that in all probability the wife's father induced her to leave the plaintiff in order that he, the father, might have a hold upon the plaintiff, and compel him to abandon his claim.

3. That the wife returned to her husband for a time, but owing to disputes between him and her father, she became a violent partizan of her father, and left her husband.

4. That the plaintiff and his wife got on fairly well together for nine years, and there is no reason why they should not continue so to live together, if not interfered with.

5. That the plaintiff admittedly, during the absence of his wife, did receive visits from prostitutes, but he has discontinued the habit for 2½ years; that the allegation of his having of late received visits from prostitutes in his stable is unfounded. That

there is no proof that he received the visits of prostitutes while his wife lived with him.

For the special appellants it is urged :—

1. That the Judicial Assistant was wrong in rejecting evidence as to the bar to the suit by limitation.

2. That he was wrong in law in holding the plaintiff not barred by his acts from claiming conjugal rights :

(a.) By reason of his alleged cruelty.

(b.) By reason of his admitted adultery.

3. That the officiating Commissioner was wrong in finding, in opposition to the Judicial Assistant, that cruelty was not proved.

With reference to the first plea urged by Mr. Spitta, it was in fact abandoned after considerable argument, and it is needless to make any observations on it. As regards cruelty, there can be no doubt that both Courts came to the conclusion that there has not been legal cruelty on the part of the husband.

There is no finding by the Judicial Assistant that there was, on the part of the plaintiff, actual violence towards his wife so as to endanger her personal safety and health, or any reasonable apprehension of it. On the contrary, he finds that if husband and wife are let alone they will live fairly happily together.

The question of the adultery is more difficult. It is contended by Mr. Spitta that by reason of her husband's adultery the wife may withhold herself from him. He cites *VIII S. W. R., P. C. 3*; *1 Indian Law Reports, Bom. 164*; the Hedaya, in which it is stated that if a man commit adultery he is to be stoned; and he argues that as by the fact of the death of the husband, the wife would be free, so it is but reasonable, seeing that in this country and at this time a man is not stoned for such offence, that the wife should be permitted to withhold herself from her husband by reason of his adultery.

For the respondent it is urged that by law and custom concubinage is permitted; that the Mahomedan law permits a man to have four wives and certain women may be his concubines; that there is little or no difference between such concubinage and sexual intercourse with prostitutes; that the law does not permit a wife to withhold herself from her husband by reason of his having had sexual intercourse with a prostitute.

For the offence zinna or whoredom by a married man, the Mahomedan Law declares the punishment to be stoning to death, if the state of marriage be one that permits lapidation. Zinna, or whoredom is thus defined in the Hedaya, Grady's, page 182: "The carnal conjunction which occasions punishment is "zinna, or whoredom, and this, both in its primitive sense, and "also in its legal acceptation, signifies the carnal conjunction of a "man with a woman who is not his property, either by right of "marriage or of bondage, and in whom he has no erroneous

“property, because zinna is the denomination of an unlawful conjunction of the sexes, and this illegality is universally understood where such conjunction takes place devoid of property, either actual or erroneously supposed. What is here said is the definition of whoredom with respect to a man: as to the whoredom of a woman, it simply signifies her admitting the man to commit the fact.”

It will be seen that the main point in the above definition, the point on which the guilt or innocence of the man rests, is the unlawful conjunction of the sexes where such connection takes place devoid of any property, either existing or erroneously supposed to exist, with regard to such women.

With certain women, who are specifically enumerated in the law, Hedaya p. 182, a married man may have sexual intercourse without punishment, for they may be his property or he may erroneously suppose they are his property: and he conceives that he may lawfully have sexual intercourse with them. In such cases he is not punishable. It is clear that the law makes a difference between concubinage with certain women and sexual intercourse with prostitutes.

In the case of a common prostitute it cannot be said the married man has any property in her, or can conceive that he is lawfully entitled to have sexual intercourse with her. He, doubtless, under Mahomedan law has committed zinna or whoredom in having sexual connection with such women, and he is liable to be stoned by that law. The plaintiff in this case would have been liable to punishment under Mahomedan law.

Now comes the question whether the wife of the plaintiff may withhold herself from him by reason of his acts of zinna, or whoredom, committed some years ago. It does not necessarily follow that the wife of the plaintiff may withdraw herself from him because under an obsolete law, so far as it relates to this country, he would or rather might be stoned to death for his acts of whoredom: nor does it necessarily follow that he has lost his marital rights by reason of those acts under existing circumstances and existing law. The Mahomedan law does not declare that a woman has the right to withhold herself from her husband by reason of an act or acts of zinna or whoredom. It does not give her the right of divorce. The husband may divorce the wife, the wife cannot divorce the husband, nor is there any procedure by which she can obtain a divorce from him. In the case of apostacy, she can, under the Mahomedan law, claim a separation from him, and she is separated from him by *talak*, or under the arrangement called *kolah*, which is made upon terms to which both are assenting parties, and operates in law as the divorce of the wife by the husband. The Mahomedan matrimonial law, as pointed out by the Privy Council in the case cited, favours the stronger sex. The husband can dissolve the tie at will, but the wife cannot of her own will separate herself from him.

There is no doubt, so far as Mahomedan law is applicable to this case, that the plaintiff has the right to the possession of his wife, and for an order that she return to cohabitation, for

there has been no legal cruelty on his part. Had the allegation of cruelty been proved, this Court would refuse to send the wife back to her husband. Nor is there proof of any gross failure by the husband of obligations which the marriage contract imposed upon him. Were that the case, there might be grounds for refusing to give him the assistance of the Court.

I am unable to say that, as amongst Mahomedans, the fact of sexual intercourse by a married man with a prostitute during the absence of his wife, she persistently for years having refused to live with him, is so gross a violation of the marriage contract that this Court is bound to refuse to accord to him rights which otherwise he can enforce. If I had reason to believe that the conduct of the plaintiff was grossly immoral; that he was in the habit of bringing prostitutes to his house, or having sexual intercourse with them when his wife was living with him, that perhaps would be a good reason for refusing his prayer for restitution of conjugal rights, for his acts would be a gross violation of the marriage contract. But there is nothing to lead me to believe that the plaintiff has of late violated, or has the intention of violating, rights which his wife may legally claim. She has persistently refused to live with her husband, not so much from incompatibility of temper, as from partizanship with her father in his disputes with her husband, and by the instigation of friends.

I am of opinion that the plaintiff is entitled to recover the custody of his wife, and that this appeal should be dismissed; all costs being chargeable to the father of the plaintiff's wife, the co-defendant.

SMYTH, J.—This is an action brought by a husband against *25th Jany. 1878*, his wife and father-in-law for restitution of conjugal rights. The parties are Mahomedans, and as no custom at variance with the law is alleged or shown to exist, the rule of decision is, under clause 2 Section 5, Act IV of 1872, the Mahomedan law.

It is clear that under the Mahomedan law the husband has a right to the custody of his wife, and that he may bring a suit to enforce that right. "The husband can dissolve the tie at his will, subject to the condition of paying the wife her dower and other allowances; but she cannot separate herself from him except under the arrangement called *kolah*, which is made upon terms to which both are assenting parties, and operates in law as the divorce of the wife by the husband. It cannot, we think, be doubted that, whilst the tie subsists, his power over her is considerable. The cases already cited are to the effect that he may compel her to return to his house if she has left it.

* * * * *

"On the other hand, the law assures to the wife considerable rights as against her husband. She may insist on maintenance according to her rank and his ability; and if he fails to give it, she may enforce that right before the *kazi*. If he has power to keep her within the *zananah*, and to prevent access to her, subject to certain qualifications, he is bound to provide her with a separate apartment, exclusively appro-

"priated to her use. As to personal violence, there are certainly passages in the Hedaya which, founded on a text in the *Koran*, imply that the husband may use it for correction; but this right of corporal chastisement is expressly said to 'be restricted to the condition of safety' * * * *. The Mahomedan law, on a question of what is legal cruelty between man and wife, would probably not differ materially from our own, of which one of the most recent expositions is the following:—
 " 'There must be actual violence of such a character as to endanger personal health or safety; or there must be a reasonable apprehension of it.' 'The Court,' as Lord Stowell said, in *Evans v. Evans*, has never been driven off this ground.'

"If, however, it be granted that, according to Mahomedan law, the husband may sue to enforce his right to the custody of his wife's person; and that, if her defence be cruelty, she must prove cruelty of the kind just described, it by no means follows that she has not other defences to the suit which would not be admitted by our Ecclesiastical Courts in a suit for the restitution of conjugal rights. The marriage tie amongst Mahomedans is not so indissoluble as it is amongst Christians. The Mahomedan wife, as has been shown above, has rights which the Christian—or at least the English—wife has not against her husband. An Indian Court might well admit defences founded on the violation of those rights, and either refuse its assistance to the husband altogether, or grant it only upon terms of his securing the wife in the enjoyment of her personal safety, and her other legal rights; or it might, on a sufficient case, exercise that jurisdiction which is attributed to the *kazi* by the *Futwa* (if the law, indeed, warrants such a jurisdiction) of selecting a proper place of residence for the wife, other than her husband's house."

These extracts are taken from the Privy Council judgment in the case of *Moonshee Buzloor Ruheem v. Shumshunissa Begum* (*XI Moore's Ind. A.*, p. 551), and I have quoted them at some length because they lay down clearly the principles which ought to guide us in deciding the present case. The defence set up by the defendant is, (1) cruelty on the part of the husband, and (2) adultery by him.

With regard to the first ground of defence, it is found by both the Lower Courts that there was no cruelty on the part of the husband: and it is clear that, whatever dissensions may have existed between the husband and wife, his treatment of her was very far from amounting to legal cruelty as defined by the Privy Council in the case above quoted. To constitute legal cruelty, there must be actual violence of such a character as to endanger personal health or safety; or there must be a reasonable apprehension of it. There was nothing of that kind in the present case.

The plea of cruelty being thus disposed of, it remains to consider whether there has been any violation by the husband of the legal rights of the wife. As pointed out by the Privy Council: "An Indian Court might well admit defences founded on

"the violation of those rights, and either refuse its assistance to the husband altogether, or grant it only upon terms of his securing the wife in the enjoyment of her personal safety and her other legal rights." And in a later part of their judgment the Privy Council say that : "It may be, too, that gross failure by the husband of the performance of the obligations which the marriage contract imposes on him for the benefit of the wife, might, if properly proved, afford good grounds for refusing to him the assistance of the Court."

The question then seems to resolve itself into this. Whether adultery on the part of the husband, which is the second ground of defence taken by the defendants, is a violation of the legal rights of the wife, or such a gross failure by the husband of the performance of the obligations which the marriage contract imposes on him for the benefit of the wife, as is spoken of by the Privy Council. I have not been able to discover, nor have the learned Counsel for the parties been able to refer us to, any cases which throw much light on that question. No doubt, adultery is looked upon as a sin of great enormity by the Mahomedan law,—so heinous, indeed, as to justify the stoning to death of a married person convicted of the offence. But I know of no authority which would justify a wife in withdrawing herself from her husband's house merely on account of his having committed adultery. If he attempted to introduce a mistress into his wife's private apartments without her consent, then that would be an invasion of the wife's legal rights, for as pointed out by the Privy Council in the passage above quoted, and also in the Hedaya : "It is incumbent upon a husband to provide a separate apartment for his wife's habitation, to be solely and exclusively appropriated to her use, *** because this is essentially necessary to her and is therefore her due the same as maintenance" (Grady's Hedaya, 143). Whether such an invasion of the wife's right would justify her in withdrawing herself from her husband's house is a question which does not arise here, for it is not found that the husband ever introduced prostitutes into his wife's apartments. Nor is it found that he ever visited or received visits from prostitutes until after his wife had left his house. All that is found is that he has frequented prostitutes at times since his wife left him ; and upon the best consideration which I have been able to give to the subject, I am of opinion that that is not such a violation of the legal rights of the wife as is contemplated by the Privy Council in the passages above cited, or such as would disentitle the plaintiff to a decree for the custody of his wife.

There was one other ground taken in this appeal, *viz.*, that when this case was remanded by this Court on the 17th February 1877, the Lower Court ought to have taken further evidence as to whether and when there was a demand by the husband for his wife's custody and a refusal by her, with a view to determine whether the suit is barred by limitation, and that the Lower Court was wrong in refusing to receive such further evidence.

This Court, when the case was formerly before it, considered that, on the record as it then stood, there was no sufficient evidence to shew that the case was barred by limitation.

One of the learned Judges considered that further evidence should be taken on that point: the other learned Judge did not join in that opinion. The judgment of this Court was, therefore, in one sense incomplete. But both the Judges considered that the case should proceed to trial on the merits, and it was so decided. In appeal to the Commissioner no objection was taken by the defendants (appellants) to the order of the first Court refusing to receive further evidence, although the defendants were then represented by counsel. I consider, therefore, that the objection, even if it were legally maintainable, was waived by the defendants, and that it should not be admitted here.

I concur in dismissing this appeal with costs, and in making the costs in all the Courts payable by the second defendant, the plaintiff's father-in-law.

No. 42.

APPELLATE SIDE. {	NABBI BAKHSH,—(Defendant),—APPELLANT,
	<i>Versus</i>
	KAKA SING,—(Plaintiff),—RESPONDENT.

Case No. 1023 of 1877.

(LINDSAY AND PLOWDEN, JJ.)

Pre-emption—Waiver of right by first pre-emptor in favour of stranger—Subsequent assertion of right against second pre-emptor—Estoppel.—Held that a pre-emptor, who has once waived his right to accept or insist upon an offer of sale, cannot afterwards come forward and re-assert his right against another person who has claimed pre-emption in the same sale, and obtained a decree transferring the property to himself.

Regular appeal from order of Additional Commissioner, Jullundur Division, dated 15th May 1877.

Protal Chandar Chatterji for Appellant.

On the 14th September 1875, Sukha Sing, Buta, and Milkhi sold to Khurma Mal, for Rs. 800, ten begas, 14 biswas of land, in Mauza Khanpur.

On 14th June 1876, Nabbi Bakhsh (defendant in the present suit) instituted a suit against Buta, Gopi, Milkhi, and Sant Sing, Ruldu and Gujar sons of Sukha Sing, and Khurma Mal, claiming a right of pre-emption.

On 21st August 1876, Nabbi Bakhsh obtained a decree conditional on his paying Rs. 660 within one month.

On the same date, Kaka Sing (the present plaintiff) filed a petition objecting to Nabbi Bakhsh's claim, as he, Kaka Sing, alleged he had a right of pre-emption and was willing to pay

Rs. 800 to the purchaser in instalments. On this, the Extra Assistant Commissioner recorded an order to the effect that nothing could be done, as the case was disposed of.

On 25th August 1876, Kaka Sing instituted the present suit against Nabbi Bakhsh, and all the defendants except Ruldu in the previous suit, claiming a right of pre-emption.

On 26th October 1876, Nabbi Bakhsh's mukhtár pleaded :

1st.—That under Section 10, Act IV of 1872, the right of pre-emption did not extend to sales under decrees for pre-emption.

2nd.—That the suit did not lie against the original vendor and vendee.

3rd.—That under Section 17, Act IV of 1872, a suit only lies against a vendee under a private sale.

4th.—That Nabbi Bakhsh had the superior right, as he was sole lambardar of the entire village, while the vendor and vendee were only proprietors of their holdings (*malik nakbuza*), and, as such, were not entitled to a right of pre-emption.

5th.—That the suit was brought at the instigation of Khurma Mal, the original vendee, the present plaintiff having no objection to the sale to him, and that plaintiff himself was about to sell his own land.

Three of the vendors and Khurma Mal, vendee, admitted the plaintiff's claim. The following issues were fixed :—

1st.—Has plaintiff or Nabbi Bakhsh, defendant, a preferential right ; if plaintiff, what effect has this on the remaining defendants.

2nd.—Did plaintiff acquiesce in the sale to Khurma Mal or not ?

The plaintiff brought forward no witnesses.

Nabbi Bakhsh, defendant, called three witnesses : Amir Khan who deposed that, in the previous year, Nabbi Bakhsh demanded revenue from Sant Singh, Buta and Milki who replied that they had sold the garden to Khurma Mal, on which Nabbi Bakhsh said they had not informed him, to which they made no reply. Nabbi Bakhsh then called Kaka Sing and asked him whether he was going to claim a right of pre-emption or not, and he replied in the negative, adding that he himself had effected the sale. Kaka Sing had the stronger claim. This witness admitted that he had had two cases with Kaka Sing. Sultan Ali Khan deposed to same effect as preceding witness, without saying who had the preferential right. He admitted that he was Nabbi Bakhsh's nephew, but added that he had had several cases with him. Ram Rattan deposed that when the Naib Tahsildar was sent to value the garden, and fixed it at Rs. 600, the present plaintiff remarked that if it had been valued higher, it would have been to his advantage ; and plaintiff never was himself desirous of purchasing the garden.

Sant Sing, defendant, being examined said his father had sold the garden, but that he did not know whether Kaka Sing had been given the option of purchasing or not.

Milkhi, defendant, one of the vendors, being examined, said no offer had been made to Kaka Sing, but that an offer was made to Nabbi Bakhsh. No offer was made to Kaka Sing, as there was enmity with him, and that Kaka Sing was not even in the village at the time.

The Extra Assistant Commissioner found that plaintiff, as a relation of the original vendors, had a preferential claim under clause 9 of the *Wajib-ul-arz* of the village; but he nevertheless dismissed the suit holding that plaintiff had informed Nabbi Bakhsh that he had no intention of putting forward his claim, and that his coming forward, after Nabbi Bakhsh had obtained his decree, was at the instigation of Khurma Mal, the disappointed vendee. In other words, the Extra Assistant Commissioner appears to have held that plaintiff, by his conduct, was now estopped from claiming.

Thereupon plaintiff appealed to the Additional Commissioner, Jullundur, who held that plaintiff had the preferential right; that he never resigned his right to Nabbi Bakhsh, or told him he intended having the sale set aside; and that the vendors had made no offer to plaintiff.

The Additional Commissioner accordingly, on 15th May 1877, decreed the plaintiff's claim on payment of Rs. 660 within one month.

From this order, the defendant, Nabbi Bakhsh, appealed to the Chief Court on the following grounds:—

1st. That his right of pre-emption was superior to that of the plaintiff, inasmuch as he, Nabbi Bakhsh, was full proprietor, and the plaintiff only a *malik kabza*.

2nd. That the plaintiff had abandoned his right of pre-emption.

3rd. That plaintiff was estopped from setting up his right of pre-emption.

The following judgments were delivered.

20th Dec. 1877.

LINDSAY J.—Two questions arise:—Did the plaintiff tacitly assent to the sale to Khurma Mal, in other words, does his conduct show that he waived his right of pre-emption as against Khurma Mal?

Assuming that to be the case, can he re-assert his right of pre-emption as against Nabbi Bakhsh? the suit having been lodged within one year from the sale to Khurma Mal.

It is quite clear from the plaintiff's admission to this Court that he received a large part of the money he offered from the original vendee Khurma Mal, a stranger; and there is reasonable ground for holding that he has been put up to make this claim by the disappointed vendee. He made no objection when the sale was made to the vendee, he did not mind a stranger coming into the village, and only at the last moment, and when the pre-emptor had got his decree, does he set up his title. He is poor, and from his own means, he is unable to purchase: he has had to borrow under very suspicious circumstances.

I think his conduct estops him from preferring his claim. It is beyond doubt that he waived his claim as against Khurma Mal. His whole conduct shows he had no intention to prefer a claim till put up to do so by some one, probably by Khurma Mal.

I would reverse the order of the Additional Commissioner of Jullundur and dismiss the plaintiff's claim with costs.

Plowden, J.—The facts have already been fully stated. In this Court, the plaintiff admitted that the money deposited by him in accordance with the decree made in his favour by the Additional Commissioner was partly procured from Khurma Mal. From the evidence and the conduct of the plaintiff, I infer that he assented to or acquiesced in the original sale to Khurma Mal, a stranger to the village; that his objection to Nabbi Bakhsh's suit on the day of its decision, after judgment and his offer to pay Rs. 800 for what had just been valued at Rs. 660, was made in collusion with Khurma Mal; and that the present suit was brought at the latter's instigation. *8th Feby. 1878.*

The first question is whether, under these circumstances, and assuming that he has a preferential right of pre-emption, the plaintiff is entitled to maintain this suit, and in my opinion he is not.

When a pre-emptor has once waived his right to accept or insist upon an offer of sale, he cannot, in my opinion, afterwards come forward and re-assert his right against another person who has claimed pre-emption in the same sale, and obtained a decree transferring the property to himself. It is clear, I think, that no fresh right of pre-emption arises upon the making of the decree in the pre-emption suit directing a sale to the plaintiff, the defendant selling by order of the Court being under no obligation to offer the property to any person as in the case of a voluntary sale.

Then, as to the original sale, it is clear that the pre-emptor who has waived his right to an offer could not maintain a suit against the original purchaser, and if he can insist upon doing so in respect of the same sale, when it has been held to enure to the benefit of another pre-emptor, it must be upon the ground that he only assented to the sale being made to, or only waived his right in favour of, the first purchaser. A pre-emptor, however, is clearly not entitled in my opinion to reject an offer conditionally in this way. His right is to have an offer made to him and to have the option of accepting or rejecting that offer within a reasonable time. He cannot say: I waive my right in favour of a particular person, and reserve it as against all others. He must make his election, and accept or reject the offer absolutely and without reservation once for all; and if he do not accept the offer, or if, as in the present case, he place himself by dispensing with an offer or acquiescing in a sale, in such a position that he cannot enforce his right against the purchaser under the original sale, he cannot assert it against one, who, by legal proceedings, gets the ultimate benefit of the same sale. In the case now before us it would certainly be a matter of regret if the law were

otherwise and the plaintiff could succeed. He waives his preferential right and acquiesces in a transfer to a stranger,—thus acting as a traitor to those common interests which the right of pre-emption is designed to protect; and when a member of the village has been at the trouble and expense of preventing the intrusion of a stranger, he seeks to deprive him, at the foiled intruder's instigation, of the property he has recovered and preserved to the community. It is satisfactory to find that the law does not, as I understand it, sanction or assist an endeavour of this kind.

This appeal is accepted, and this suit is dismissed with costs in all the Courts against the plaintiff, to be paid out of the sum deposited by him in Court for purchase money under the Commissioner's decree.

No. 43.

APPELLATE SIDE. {	J. ROBSON (Judgment-debtor), DEFENDANT, APPELLANT,	
		<i>Versus</i>
	MAHOMED MAHSON—(Decree-holder),—PLAINTIFF,	

RESPONDENT.

Case No. 1014 of 1877.

(LINDSAY, PLOWDEN AND SMYTH, JJ.)

Limitation—Act IX of 1871, Schedule II Art. 167—Decree providing that execution shall be stayed for a certain period—Date from which limitation begins to run.—On 4th November 1873, M. M. obtained a decree against R., but the decree provided that execution should be stayed until a cross-suit, lodged by R., should be decided. The suit lodged by R. was finally decided on 7th March 1876, and M. M. on 4th April 1877 (within 3 years from the date of the final decision in the cross-suit, but after 3 years from the date of the decree obtained by M. M.,) applied for execution.

Held by Lindsay and Plowden JJ., (Smyth J. dissenting,) that when a decree is passed which by its terms is not to be executed till a future date, the date of the decree, and not the date when it becomes enforceable is to be taken in computing the period of limitation under Clause 1 Article 167 Schedule II, Act IX of 1871. And, therefore, that the application of 4th April 1877 was barred.

Per Smyth, J., *contra*.—In the case of a decree which by its terms is not to be executed till a future date, "the date of the decree," in the sense in which those words are used in Clause 1, Article, 167, should be taken to be the date on which the decree becomes enforceable, and not the date on which the decree was passed.

*Regular appeal from order of Commissioner, Multan Division,
dated 26th June 1877.*

Spitta for Appellant.

Gouldsbury for Respondent.

The facts are sufficiently stated in the following judgments.

LINDSAY, J.—A decree for money was passed on the 4th *30th Jany. 1878.* November 1873 in favour of plaintiff, the decree-holder. In the decree, the Court recorded that execution of decree should be stayed till a cross-suit, lodged by Mr. Robson, should be decided. This suit by Mr. Robson had been lodged in another Court, and it was finally decided by the Chief Court on the 7th March 1876.

The plaintiff then took out execution of his decree, that is, on the 4th April 1877. An order in his favour has been given. It is contended that the application to execute the decree was barred. For the respondent, the decree-holder, it is contended that the Court had authority in its decree to stay execution till the result of a cross-suit was known; that the decree-holder in the face of the order staying execution could not apply for execution.

Act IX of 1871 is applicable to this case. There is nothing in the Act that warrants the conclusion that limitation does not run from the date of the decree, though the operation of the decree be deferred by express order of the Court. The words of the Act are clear, that time begins to run from the date of the decree, except where the application is to enforce payment of an instalment which the decree directs to be paid at a specified date, and then it runs from the date so specified. It is impossible to bring the present case by any subtlety of reasoning within the scope of that part of the law that refers to instalments. In fact, there was an omission in Act IX of 1871 to provide for a case like the present one. As to Section 209, Act VIII of 1859, it is not applicable, as it refers to applications made in execution of a decree, and where another case is pending in the execution Court against the holder of the decree.

As a matter of fact, the decree-holder had ample time after the decision of the cross-suit, and the expiration of the period of limitation to have sued out execution of his decree, but apparently he seems to have considered the three years began to run from the date of the final order on the cross-suit.

A number of cases decided under the former limitation law have been mentioned, but I cannot accept any of them as applicable to this case. I hold a decree to be a decree so soon as it is passed, even if its operation be deferred. The decree was open to appeal when passed, and the decree-holder could have moved the Appellate Court to set aside so much of it as appeared prejudicial to his interests. The appeal should be decreed with costs.

SMYTH, J.—The facts are these: Mahomed Mahson brought a suit against Mr. Robson in the Court of the Assistant Commissioner of Multan, and, while the suit was pending, Mr. Robson brought a cross-suit against Mahomed Mahson in the Court of the Deputy Commissioner of Mooltan to recover Rs. 2,090-10-0. In the former suit, the Assistant Commissioner, on the 4th October 1873, gave Mahomed Mahson a decree against Mr. Robson for Rs. 620, but coupled with it the condition that "execution of decree, however, will not take place until settlement of the cross suit—above adverted to." The cross-suit was transferred for trial to the Court of the Extra Assistant Commissioner of Ludhiana by whom a

decree was passed on 23rd January 1875 for Rs. 1,547-14-0 in favour of Mr. Robson. This decree was upheld on appeal to the Commissioner of Umballa on the 1st July 1875, but in further appeal to the Chief Court, the decree was reversed, on the 7th March 1876, and the suit dismissed.

Meanwhile, Mahomed Mahson had taken no steps to execute his decree of 4th October 1873 against Mr. Robson. But, on 4th April 1877, he put in an application to enforce the decree. The Assistant Commissioner held that it was barred by limitation as more than three years had elapsed from the date of the decree. The decree-holder appealed to the Commissioner of Mooltan, who held that, under the circumstances of the case, limitation must be held to run from the 7th March 1876, the date on which the Chief Court had decided the cross-suit in appeal, and, therefore, that the application was within time.

The judgment-debtor now appeals to this Court on the grounds that the application is barred by limitation, and that the order of the Original Court, postponing execution, was illegal, and gives no fresh starting point. The order postponing execution was not made under Section 209, Act VIII of 1859, and could not have been made under that Section, as the suits were brought in different Courts. Moreover, Section 209 provides for the stay of execution after a decree has been passed, and not for the insertion of an order for the stay of execution in the decree itself. Section 209, therefore, does not apply to this case.

But I am not prepared to hold that the Assistant Commissioner's order staying execution until the cross-suit was determined, was illegal. It is by no means unfrequent in the Punjab for a Court, in giving a decree, to make it enforceable at a future date. For instance, decrees for money against zamindars in favour of money lenders are often made payable at harvest time, and decrees for possession of land under crop are often made enforceable only after the crop has been cut. It is often convenient and equitable to make a decree in that form, and I cannot say that the Assistant Commissioner was wrong in making Mahomed Mahson's decree enforceable only after the cross-suit against him had been decided.

It remains to consider what effect a stipulation contained in a decree, and forming part of such decree, whereby the decree is made unenforceable before a date fixed in the decree, has upon the question of limitation in respect of an application for executing the decree. Article No. 167, Schedule II, Act IX of 1871 has omitted to provide for a case of this kind, which is the more singular as a similar question had been raised and considered in cases arising under the former limitation law, Act XIV of 1859, Section 20. That Article provides for the case of a decree payable by instalments, but not for a decree for payment of one entire sum at a future day named. The only provision in the Article which applies to the present case is that contained in the first clause, by which limitation is made to run from the date of the decree.

If we hold that the 4th October 1873 was the date of the decree, then no doubt the application for execution in this case was barred. But I am reluctant to come to a conclusion which seems to me to be so inequitable, under the circumstances of this case, and I can hardly think that it could have been the intention of the Legislature to make limitation run from the date when a decree is passed in those cases where the decree is not enforceable until a future date. I think in such cases the date when the decree becomes enforceable should be held to be the date of the decree.

There are several decisions under Section 20, Act XIV of 1859, which support this view. Thus, in a case reported at page 173 of *IV Mad. H. C. Rep.* a decree was given for money with a direction that it should be paid into Court on or before a certain date. The application for execution was made more than three years after the date of the decree, but within three years from the period at which it was obligatory on the defendant to pay the amount into Court according to the terms of the decree. The High Court held that Section 20 of Act XIV of 1859 is not applicable to a decree until the liability under it has become enforceable by process of execution, and, therefore, that the period of three years must be reckoned from the time when the decree became enforceable.

A Full Bench of the Calcutta High Court had, in a previous case, (*VII Suth. W. R. 521*) held that the words "any judgment, decree, or order," used in Section 20, Act XIV of 1859, must mean a judgment, decree, or order which the person in whose favour it is given is at liberty to enforce by execution. So in a case reported at page 38 of *VI Bom. H. C. Rep.* where a decree was made payable by instalments, the Court held that: "As no application for the execution of the decree could be made till the time fixed for the payment of the first instalment had elapsed, the above date must, for the purposes of Section 20, Act XIV of 1859, be looked upon as the date of the decree." And it was similarly held in a case reported at page 45 of the same volume, the Court remarking: "It appears to us that, when a decree awards payments by instalments to be made at particular specified dates, the date when each instalment becomes due must be held to be the date of the decree with respect to that particular instalment, and for the purpose of enforcing the payment of that instalment. It would be obviously very inequitable if a period of limitation were to commence to run against a decree-holder from a date earlier than the earliest date at which it would have been possible for him to obtain payment of a particular instalment, and we cannot suppose that the Legislature could have intended a result which would be so plainly opposed to all ordinary ideas of justice." It is to be noted, however, that in this case one of the grounds given in the judgment was that: "There are no words in Section 20, Act XIV of 1859, which prescribe that the date on which a decree has been passed is to be the starting point from which the term of limitation is to run, and, in the absence of such words, it is a legitimate and reasonable construction that, in decrees

“payable by instalments, the date when each separate instalment first becomes due is the date from which the term of limitation must be held to commence.”

These cases were all decided under Section 20, Act XIV of 1859, which contained no provision for the execution of decrees payable by instalments. The principle which they lay down seems to me to be applicable to the present case. Article 167 of Schedule II of Act IX of 1871, while it prescribes that limitation shall begin to run from the date of the decree, does not prescribe that the date of the decree must be understood to mean the date on which the decree was passed; and that being so, I think I am justified in following the decisions which I have cited and in holding that when a decree for money is by its terms not enforceable till a future date, that date, and not the date on which the decree was passed, must be taken to be the date of the decree within the meaning of the first Clause of Article No. 167, Schedule II, Act IX of 1871.

If I am right in that view, then the application for execution in the present case was made within time,—for whether we hold that the decree was enforceable after the decision of the cross-suit in the Extra Assistant Commissioner's Court, or not till the decision of the appeal by the Chief Court, the application would in either case be within time. I would dismiss this appeal with costs.

Owing to the above difference of opinion, the case was referred to a Full Bench on the following question:—

“When a decree is passed, which by its terms is not to be executed till a future date, is the date of the decree to be taken as that on which it was passed, or the date when it becomes enforceable, for the purpose of determining the question of limitation under clause 1, Article No. 167, Act IX of 1871, Schedule II?”

The following judgments were delivered after the hearing before the Full Bench.

11th Feby. 1878.

PLOWDEN, J.—I think the answer to the question referred should be that “the date on which a decree is passed” and not “the date on which the decree becomes enforceable” is “the date of the decree” for the purposes of Article No. 167 of Schedule II, Act IX of 1871.

The former is the obvious popular meaning of the expression, and I do not think it can be said to have acquired any technical meaning differing from its popular meaning. The vast majority of decrees being presently enforceable, the popular and the technical meaning are identical as regards them, and only differ in those rare and exceptional cases, where the decree is by its terms not presently enforceable.

It is true that, in construing Act XIV of 1859, Section 20, the Courts have held that, in relation to a decree not presently enforceable, the expression “the date of the decree” (which it is

to be observed is not to be found in that Section*) must be deemed to mean the date when the decree becomes enforceable. This general rule the Courts applied under Act XIV of 1859, to two species of decrees,—decrees directing payments by instalments, (*I Agra F. B. 83*; *VI Bom. H. C. Rep., A. C., 38 and 45*; and *XI S. W. R., 232*); and decrees directing payment of an entire sum on a specified future date (*IV Mad. H. C., R., 173*). Now, when Act IX of 1871 was being enacted, it was open to the Legislature to accept the interpretation placed by the Courts on their own phrase “the date of the decree,” and with this phrase to introduce the same interpretation into the new law.

The natural mode of doing this would have been by adding a Section to Chapter III on the “Computation of the period of Limitation,” or an explanation (as in Article 123 and Article 132) to Article 167, to the effect “that the expression ‘the date of the ‘decree’ signified, for the purposes of execution, the date on which the decree is, or by its terms becomes, presently enforceable.” If the Legislature had done this, it would have been clear, or, if it had omitted altogether the 4th clause in the 3rd column of Article 167, it might perhaps have been assumed that the Legislature used the phrase with the meaning previously assigned to it by the Courts.

Instead of acting in any of these ways, however, the Legislature has, in the last clause of the Article, made an express provision for a single species of the exceptional class of decrees not presently enforceable, namely, decrees directing payment by instalments; and has made no similar provision for any other species of the same class. If the Legislature used the expression “the date of the decree” in the sense which the Courts had assigned to it, the enactment of the last clause was superfluous. If they used it in its popular sense, the enactment was necessary to give effect to the intention of the Legislature regarding one species of the exceptional class of decrees not presently enforceable.

In the absence of any such express provision as I have mentioned, in the body of the Act, or appended to Article 167, and in the presence of the last clause of that Article, I think we must hold that the Legislature has used the phrase “the date of the decree” in its most obvious meaning, and has not expressed an intention as regards any species of decrees not presently enforceable, other than instalment decrees; that the date when the decree becomes enforceable shall be treated as “the date of the decree,” in calculating the period of limitation under Article 167. The ordinary rules as to the construction of Statutes seem to me to lead to this conclusion, and they must, I think, be applied to an Act so elaborately and minutely drawn as the Limitation Act of 1871; though greater latitude of construction might have been permissible in dealing with the less artificial enactment which it replaced, as was held by the Privy Council in construing Section 20 of Act XIV of 1859, in the case of *Orchard v. Dehli and London Bank*, (*Punjab Record for 1878, Case No. 7*).

* As to this, see *VI Bom. H. C., A. C., p. 49*.

To construe the phrase in the other manner suggested would, as it seems to me, be to ascribe to the Legislature an intention which, if it entertained it, it has omitted to express in the language it has employed.

11th Feby. 1878.

SMYTH, J.—I have little to add to the remarks which I made in my judgment of the 30th January. For the reasons I then gave, I consider that, in the case of a decree which by its terms is not to be executed till a future date, “the date of the decree” in the sense in which those words are used in the first clause of Article 167, Schedule II of Act IX of 1871, should be taken to be the date on which the decree becomes enforceable, and not the date on which the decree was passed. My reasons for so holding are briefly these: A decree which is not enforceable till a future date, is a decree merely in name. It does not become a real or absolute decree until the date arrives when it is enforceable. For purposes of limitation in execution, therefore, that date must, I think, be held to be the “date of the decree.” It was so held in the cases which I cited previously, and although those cases were decided under the former law, the principle is equally applicable under the law contained in Act IX of 1871. Those cases are so consistent with justice, that I feel myself bound to follow them. The view here taken of the meaning to be attached to the word “date” is supported by a dictum of Couch C. J. in a case at page 248 of *XXI S. W. R.* That was a case where an application was made under Section 327, Act VIII of 1859, to file an award, and the objection was taken that the application was barred by limitation as more than six months had elapsed since the date of the award. The objection was over-ruled on the ground that the application was made within six months from the time when the parties were furnished with the award. “It would not be right,” remarked Couch, C. J., “when they refused to give the award for more than six months, that he should be precluded from enforcing it under Section 327. We should think, if it were necessary to decide that question, that the word ‘date’ does not mean the day written in the award, as when it was made, but the time when it is given to the parties, when it becomes an award and is handed over to them, so that they may be able to give effect to it.”

11th Feby. 1878.

LINDSAY, J.—I adhere to the opinion expressed by me in referring the case to a Full Bench.

13th Feby. 1878.

A Full Bench having decided that the application of Mahomet Mahson was out of time, the Division Bench decreed Mr. Robson's appeal with costs.

No. 44.

MAHOMED DIN,—(Plaintiff),—PETITIONER,

Versus

BANKA,—(Defendant),—RESPONDENT.

} REVISION-SIDE.

Case No. 766 of 1877.

(SMYTH AND ELSMIE, JJ.)

Act XI of 1865, Section 6, proviso 4—Jurisdiction—Small Cause Court—Suit for rent of cultivated land.—A suit for rent of cultivated land is excluded from the cognizance of a Court of Small Causes by the 4th proviso to Section 6 of Act XI of 1865.

Petition under Section 622, Act X of 1877, for revision of the order of the Judge Small Cause Court, Lahore, dated 23rd November of 1877.

The Judgment of the Chief Court was delivered by

SMYTH, J.—This was a suit for the rent of cultivated land *20th Feby. 1878.* and at the time of the passing of Act XI of 1865 it would have been heard in the Revenue Court. Therefore, with reference to proviso (4) Section 6 of that Act, it is not now cognizable in a Small Cause Court. We set aside the Judge's order of the 23rd November 1877 as made without jurisdiction.

No. 45.

DEVI DAS,—(Plaintiff),—APPELLANT,

Versus

NARAINA & 9 OTHERS,—(Defendants),—RESPONDENTS.

} APPELLATE SIDE;

Case No. 742 of 1877.

(LINDSAY, PLOWDEN AND SMYTH, JJ.)

Custom—Chondriat dues. Nowshera bazaar.—Plaintiff sued for a declaration of his right to one-fourth seer per maund on all foreign grain weighed within the Nowshera bazaar in lieu of service as chowdry, according to ancient custom. *Found* by the Full Bench that no such custom was proved; that it was only with the consent of the shopkeepers, defendants, that plaintiff as chowdry could levy the fees; and that, unless with such consent, or as remuneration for services actually rendered at the request of parties, plaintiff was not entitled to levy the fees.

*Regular appeal from order of Additional Commissioner,
Peshawar, dated 16th February 1877.*

Rattigan, Spitta and Kali Prosono Roy for Appellant.

Morton and Bates for Respondents.

The facts of this case are fully stated in the judgments delivered by the Chief Court.

The appeal first came on for hearing before FITZPATRICK AND PLOWDEN, JJ., and was referred to a Full Bench by the following order of

PLOWDEN, J.—(Fitzpatrick, J., concurring).—The plaintiff in 9th Novr. 1877, this case sues for “a declaration of his right to one-fourth seer per maund on all foreign grain weighed within the kasba, in lieu of service as chowdry, according to ancient custom.”

The defendants are 22 shopkeepers in Nowshera kalan, and they pleaded, among other pleas, that this is a suit for “*dharat*,” or a kind of tax, and that no suit will lie to recover it. They also pleaded that the plaintiff has not been appointed or recognized by any competent authority, and that, by the custom of the “*zilla*,” a chowdry is appointed by a punchayet, which has also the power of dismissing him.

It appears that the plaintiff is the son of one Sada Nand, who is still alive, but has resigned his office (assuming it to be one) in favour of his son. It also appears that Sada Nand in 1862 stated, in a suit against him, that “the plaintiffs (shopkeepers of Nowshera kalan) had voluntarily given him the right of weighing things required by Government and others; that if the plaintiffs were not content to give him the right, he would not take it; that the consent of the plaintiffs was requisite.”

It does not appear that the right to collect this *dharat* has been recorded in any Settlement proceeding or by the Government;

but the Deputy Commissioner of the District and other officers have, on various occasions, recognised the plaintiff's father as "chowdry."

The first Court decreed the claim; but the Commissioner dismissed the suit, as not being cognisable by a Civil Court, quoting the judgment of the Financial Commissioner, No. 8 *P. R.* of 1872, (Revenue Judgments).

In this Court, it was argued that this suit would lie; and the following cases were quoted: *I Bom. H. C. Rep. 118, and XI Bom. H. C. Rep. 6*, and cases there cited; *IV S. D. A. (Bengal), 159, and VII S. D. A. (Bengal), 282; I Morley's Digest, New Series, 143; II Agra H. C. (1867), 271; P. R. 38 of 1872; and III S. W. R. (Act X of 1859), 158.*

It was contended that the office was one which had existed from time immemorial; that there were certain fees attached to the office; and that the plaintiff had been disturbed in the exercise of his office by the defendants and was entitled to an injunction to restrain them.

Reference was also made to an agreement of 10th Katak 1928, purporting to have been made by 13 shopkeepers of Nowshera kalan, admitting the chowdrie's right; but the suit is not based upon this, and it is contended that the defendants did not execute it,—a point which has not been decided or apparently gone into in evidence. The right being claimed as one based upon custom, this agreement is of little importance.

Of the cases cited, some are not in point; but the Bombay decisions appear to support the plaintiff's claim by reference to cases which are, in some respects analogous, *viz.*, those of a *kazi* and of a village priest. In regard to these latter, the law in Bombay seems to differ from the law both in Bengal and the N. W. P., and in the Punjab as recognised in the cases No. 38 *Punjab Record* 1872, and No. 7, *Punjab Record* 1877. Indeed, the law in Bombay seems to have uniformly followed the precedents in the earliest cases decided upon principles which, at one time, prevailed in Bengal; but which were subsequently abandoned, as is pointed out in one of the judgments in the case No. 7 of *Punjab Record* 1877. Of the decisions above-mentioned, that at *II N. W. P. (1867) 271*, is clearly against the plaintiff's claim, and there are other cases, not cited at the argument of the appeal, which support that case. Thus, the late S. D. Adalat of the N. W. P. held in 1859

See Digest *N. W. P. Cases* (case No. 111 page 127) that the titular *kazi* of a pargannah could not recover by action, fees voluntarily paid to another party for the performance of rites, ceremonies or duties which the titular *kazi* in virtue of his office might have been, but was not, called upon to perform. This decision is not reconcilable with the Bombay decisions above mentioned.

The decision of the Financial Commissioner (No. 8 of 1872) is also, so far as it goes, in favour of the defendants. I am inclined to think that the decision of the Agra High Court above cited

is correct ; but as the question is one of some importance, and there is room, as the conflicting decisions show, for diversity of opinion, I think the best course will be to lay this appeal before a Full Bench of the Court for decision.

The appeal came on for hearing before a Full Bench consisting of Lindsay, Plowden and Smyth, JJ.

The following judgments were delivered.

LINDSAY, J.—The ground of this claim is sufficiently set *15th Feby. 1878*. forth in the judgment of my colleague Mr. Justice Plowden.

The question placed before the Full Bench is this: Assuming the plaintiff to be the chowdry of Nowshera kalan, is he entitled by custom to demand, and can he by custom enforce, certain fees upon all sales of grain, *i.e.*, one-fourth of a seer in each maund of grain weighed and sold ?

The cases and authorities noted at the foot of this judgment

I Bom. High Court Rep. App., 36.

Punjab Record for 1867, No. 36.

Punjab Record for 1873, No. 65.

Circular IV, p. 12, Consolidated Circulars.

S. D. Adalat 1859, 127.

S. D. Adalat 1860, 73.

S. D. Adalat 1861, 720.

S. D. Adalat 1867, 271.

II S. W. R., 69-70.

V S. W. R., 225.

Macpherson's Civil Procedure 2nd ed., 40.

IV S. D. Adalat, 159.

I Morley's Digest, New Series, 143.

were cited by Counsel on the case being argued before the Full Bench of this Court.

I have examined the record and the evidence; also the case decided in 1862.

That was a suit brought by Vadu and others, shopkeepers in Nowshera Pār (styled in the present suit Nowshera kalan) against Inayatula Khan, Maddat, and Sada Nand, father of the present plaintiff, to contest the right of the then defendants to take fees on weighments of grain.

From that suit it appears that, previous to the year 1849, Nowshera Pār had been to a great extent destroyed by floods from the river Lande; that in 1849, Inayatula and Maddat, lambardars of Nowshera Pār, rebuilt the serai and established or re-established a mundi or bazaar. Certain Hindoos took the lease of the bazaar, about 6 months before the suit had been lodged.

The *shopkeepers* of Nowshera Pār in 1862 objected to pay fees on weighments of grain and contended *they* had the right to take such fees. Sada Nand, father of the present plaintiff, in his reply admitted that the payments were voluntary; that if the plaintiffs objected to pay the dues, he would not claim them; that the consent of the plaintiffs was necessary. Inayatula Khan and Maddat Khan in their reply stated they had established the mundi 13 years previous; that the *lessees* had the right to realize fees on weighments; that they took all the income of every kind, paying a fixed sum to them (defendants) on the lease, of which sum they (defendants) gave one-fourth to the co-defendant Sada Nand. The Tahsildar reported that the plaintiff's claim was a good one, the defendants only being entitled to the amount of the lease, and fees on weighments being claimable by the shopkeepers. The Deputy Commissioner threw out the claim.

Since that period, there have been many disputes in Nowshera kalan regarding "*dharat*," or fees on weighments of grain; but the point whether the claim can be enforced has not arisen.

It seems to me perfectly clear from the simple facts of this case that the plaintiff has not established by custom a right to demand and enforce a fee on all weighments of grain to the exclusion of others: what his father could not do in 1862, his son can not claim to do now. The plaintiff may have taken fees on weighments, but I have no doubt that the claim cannot be enforced on the ground of custom against any person refusing to pay the fee claimed.

I need not enter into the general question as to whether a custom, such as that alleged, exists, or rather can exist, for it is perfectly clear to me that in this particular case it does not exist.

15th Feby. 1878.

SMYTH, J.—The question is whether the plaintiff, as chowdry of the Nowshera bazaar, is entitled by custom to levy *dharat*, or weighman's fees on all grains and other merchandise imported into and sold in the said bazaar, whether the vendors or purchasers avail themselves of his services or not. It is conceivable that the chowdry of the bazaar may, by long established usage, have such a right; but the right is one of such a nature that it would require to be established by clear and unimpeachable evidence, before it could be recognized by a Court of law. This is not a case of the ordinary kind where the *dharat* is claimed by the owners of the soil on which the bazaar has been erected. It is conceivable that a village community, when allowing a bazaar to be erected on their lands, should reserve a right to levy dues on all goods imported for sale into the village. Where there is evidence that such a right has been long exercised by the zamindars, a Court of law may well recognize it and give a decree declaring and enforcing it. But it is difficult to understand how, unless by consent of his fellow shopkeepers, or as remuneration for services, the chowdry of a bazaar erected on the land of private persons and with no rights of his own in the soil, could become entitled to levy any dues upon goods imported into the bazaar for sale. If services are rendered at the request of parties, then of course the customary remuneration for such services must be paid. But that is not the case here. The chowdry claims to levy the fees whether he renders services or not. It may be that a right of that kind might spring up originally with the consent of the parties and become perfected by long established usage. But we have no proper evidence of long established usage in the present case. The plaintiff's father, Sada Nand, appears to have been the first chowdry appointed; at least we have no evidence as to whether there was any chowdry before him, or, if there was, what the practice was in the time of his predecessors. Sada Nand alleged he held the office for 50 years. But it does not appear that his right to levy *dharat* was ever clearly recognized or peaceably enjoyed. The records of the Deputy Commissioner's Office show that since 1862, if not before, his right has been constantly disputed. And in the case which the Nowshera shopkeepers brought against him in that year, he himself, when ex-

amined on the 1st November 1862, admitted that it was by the consent of the shopkeepers that he received the dues, and that he could not levy them without their consent. His levy of the dues has been constantly resisted since that time, and it is because it is so resisted that the plaintiff, who is Sada Nand's son and his successor in the chowdryat, has brought the present suit to have his right to levy the fees judicially declared.

I consider that it was only with the consent of the shopkeepers that the chowdry was enabled to levy the fees, and that, unless with such consent, or as remuneration for services actually rendered at the request of parties, he is not entitled to levy the fees. That being so, I think this suit was rightly dismissed by the Lower Appellate Court, and I would dismiss this appeal with costs.

LOWDEN, J.—I concur with my learned colleagues in holding that the plaintiff has not established a customary right to levy fees, such as he alleges, assuming that, if it was proved, it is one which could be enforced by suit. The exaction of such fees has long been insisted upon by both the plaintiff's father and himself, and as long resisted by the shopkeepers, on whom he seeks to impose it, while there was a clear admission in 1862, by his father, who, so far as appears, is the first titular chowdry of Nowshera kalan, that he could not levy the fees now claimed against their will. 15th Feby. 1878.

The appeal is dismissed with costs.

No. 46.

DITTA AND OTHERS,—(Plaintiffs)—APPELLANTS,

Versus

KHUDAYAR AND ALALOK,—(Defts.)—RESPONDENTS.

} APPELLATE SIDE.

Case No. 973 of 1877.

(SMYTH AND ELSMIE, JJ.)

*Custom—Gift to daughter's son—Gujar tribe of Gujrat District.—*The *wajib-ul-arz* allowed gifts of land by a proprietor to his daughter and son-in-law. *Held* that a gift to the daughter's son was within the spirit of the *wajib-ul-arz*, and that, not being opposed to custom, it was valid.

Regular appeal from order of Commissioner, Rawalpindi Division, dated 24th April 1877.

Bates for Appellants.

Khudayar, defendant No. 1, gave away all his property (consisting of 29 ghamoas, 7 kanals and 13 marlas of land in mauza Phogwal, Tahsil and Zilla Gujrat), to Alalok, defendant No. 2,

by a registered deed of gift and had mutation of names effected. Alalok was a very distant connection of Khudayar's, but his father Bhola was Khudayar's son-in-law.

Plaintiffs, first consins of Khudayar, sued to have the gift set aside, on the ground that the transfer of property in this manner was contrary to the custom of their tribe, *viz.*, Gujars.

The Judicial Assistant, relying on Chief Court ruling No. 39, *Punjab Record* 1876, decreed the plaintiffs' claim and cancelled the gift.

On appeal, the Commissioner gave judgment as follows :—

"The defendants appeal and say that the *riwaj-i-am* supports their right. I think it does (see clause 10 of it), and consider this case as differing from No. 39 of 1876. In that instance the donee was a man of another village, whereas in this instance the donee belongs to the same village and the same family though somewhat distant, and is a proprietor of land, and co-parcener in the village with the donor and reversioners. I think, therefore, that the gift is valid and is not opposed to recognized Gujar custom, and accepting the appeal, I reverse the decision of the lower Court."

From this order, plaintiffs appealed to the Chief Court.

Bates for appellants urged that the Commissioner was wrong in holding that the gift was valid by custom.

The judgment of the Chief Court was delivered by

3rd April 1878.

SMYTH, J.—We consider that the gift is entirely within the spirit of the provision in the *wajib-ul-arz*, which allows of gifts by a proprietor to his daughter and son-in-law, and that it is not opposed to custom.

We therefore dismiss this appeal with costs.

No. 47.

APPELLATE SIDE.

CHANNU, NAR SINGH AND LABHA,—APPELLANTS,

Versus

DEVI SINGH, BALWANT SINGH, AND MUSSUMMAT BHAGAN,—RESPONDENTS.

Case No. 1762 of 1877.

(SMYTH AND ELSMIE, JJ.)

Custom—Adoption—Bujwa Rajputs of Sialkot District—Construction of riwaj-i-am—Near relative.—*B. S.*, whose father *D. S.* had been adopted by a collateral *G.*, was adopted by *S. D.*, own brother of *D. S.* The *riwaj-i-am* of the District ran to the effect that "among Bujwa Rajputs a proprietor may, having regard to near relationship, adopt a son from collaterals descended from the same common ancestor, but may not adopt a person from another caste, or a daughter's son, or a sister's son, or a son-in-law."

It was also found after a local enquiry that no custom existed which would render the adoption invalid,

Held that the proper construction of the *riwaj-i-am* was not that the nearest relative *must* be adopted, so as to invalidate the adoption of a relative, otherwise eligible. The rule of *factum valet* would apply; and as no other custom existed rendering the adoption invalid, it must be upheld.

Special appeal from order of Commissioner, Amritsar Division, dated the 16th August 1877.

Cullin for Appellants.

Rivaz for Respondents.

The facts of the case are sufficiently stated in the judgment of the Chief Court, which was delivered by

SMYTH, J.—It is found on the question of fact that Balwant Singh was adopted by Shib Dyal, and that finding cannot be questioned, nor is it questioned, in special appeal. *8th May 1878.*

But Mr. Cullin contends that the adoption is invalid, on the ground that it is opposed to a custom which exists among Bujwa Rajpûts, the tribe to which the parties belong, and which makes it obligatory on a person of that tribe, who wishes to adopt a son, to select his nearest relation in the collateral male line. Now, Balwant Singh, though a son of Shib Dyal's brother, Devi Singh, and therefore a near blood relation of Shib Dyal, cannot, Mr. Cullin contends, be considered to be a near relation of Shib Dyal within the meaning of the custom, because his father, Devi Singh, was adopted by one Gobind, and having thus become a member of Gobind's family ceased to belong to his brother Shib Dyal's family. His son, Bulwant Sing, therefore, cannot be regarded as standing to Shib Dyal in the relation of a nephew.

It is argued on the other hand by Mr. Rivaz that there is no such custom among Bujwa Rajputs as would limit Shib Dyal's selection of a lad for adoption to his nearest relation, and that, even if there were such a custom, Bulwant Singh would be eligible, because although his father Devi Singh was adopted by Gobind, he did not thereby cease to belong to his own natural family, the adoption having been one of the kind usual in the Punjab where there is merely a taking and giving of the child, and where no ceremonial observances are celebrated. Moreover, Devi Singh was allowed to succeed to a share of his natural father's land, and he admitted his brothers to a share of the land which he had received from his adoptive father, Gobind, which would not have been the case if he had ceased to belong to his natural father's family.

The first question which arises is, whether there is a custom such as that contended for by Mr. Cullin. He relies chiefly on an entry made in the *riwaj-i-am* at the late Settlement of the Sialkot District, which is to the effect that among Bujwa Rajpûts a proprietor may, *having regard to near relationship*, adopt a son from collaterals descended from the same common ancestor, but may not adopt a person from another caste, or a daughter's son, or a sisters' son, or a son-in-law.

It is not clear that this entry in the *riwaj-i-am* would bear the construction contended for, *viz.*, that the nearest relation in the male line must be chosen. The meaning would rather appear to be that a descendant from the same common ancestor in the male line must be chosen, and that preference should be given to a near relation over one more remote; but it would we think be going too far to hold, on this entry, that if a relation, otherwise eligible, were adopted, the adoption must be held to be invalid simply on the ground that there were relations in existence at the time of the adoption who were nearer in order of relationship to the adopter than the adopted son. In such a case, we think the rule of *factum valet* would apply.

It is to be observed that Gobind was of the same *Gote* as Shib Dyal, both having been descended from the same common ancestor, so that, whether we regard Balwant Singh as thenephew of Shib Dyal by blood or as the grandson of Gobind through Gobind's adopted son, in either case he would satisfy the condition in the *riwaj-i-am* which limits the selection to descendants in the male line from the same common ancestor.

The meaning of the entry in the *riwaj-i-am* not being free from doubt, and the interpretation put upon it by Mr. Cullin having been disputed by the defendants, the Commissioner directed an enquiry to be made as to whether Balwant Singh's adoption by Shib Dyal would be valid according to the custom of Bujwa Rajpúts. The result of that enquiry was to show that there is no local custom under which the adoption would be invalid, and the Commissioner accordingly upheld it.

Nothing has been urged before us which leads us to think that, on the facts found, and on the evidence taken as to custom, the Commissioner's decision is erroneous, and we accordingly dismiss this appeal with costs.

No. 48.

APPELLATE SIDE. {	KIRPA RAM,—(Defendant)—APPELLANT,
	<i>Versus</i>
	JAMNA DASS, GHASITU, SHADI AND GOLAB,—(Plaintiffs)—RESPONDENTS.

Case No. 1579 of 1877.

(PLOWDEN AND SMYTH, JJ.)

Act VIII of 1859, Section 346—Act IX of 1873, Section 7—Dismissal of appeal for default.—On 23rd May 1877, appellant filed an appeal in the Judicial Assistant's Court at Umballa, which was ordered to be registered and brought up with the file of the case on 13th June. On that date, appellant being absent, the appeal was dismissed for default under Section 346, Act VIII of 1859, though no notice had issued to respondents, and the date was only fixed under Section 7, Act IX of 1873, for hearing appellant or his pleader in support of his petition of appeal, *Held* that the order of dismissal was illegal.

An Appellate Court is only competent to dismiss an appeal for default under Section 346, Act VIII of 1859, when a date has been fixed under Sections 344 and 345 for hearing the appeal.

There is nothing in Section 7, Act IX of 1873, which renders it obligatory upon an appellant whose appeal has been registered to appear in support of his petition, or which authorizes the Appellate Court to dismiss the appeal for default.

*Special appeal from order of Judicial Assistant, Umballa,
dated 25th June 1877.*

Kali Prosono Roy for Respondents.

The facts of the case are sufficiently stated in the judgment of the Chief Court which was delivered by

LOWDEN, J.—In this case, the appellant presented an appeal *10th May 1878.* from the order of the Tahsildar of Jagadri, to the Court of the Judicial Assistant, Umballa.

The appeal was presented on May 23rd 1877, and on the back of the petition is endorsed an order, under date May 23rd, that “the petition be brought up with the record, to be brought “up with the file on June 13th.” There is nothing upon the record to show that notice of the date fixed for the petition and file to be brought before the Judicial Assistant, was given to the appellant.

The petition not having been rejected or returned to the appellant, we presume that it was registered on May 23rd, the date of the above order.

Assuming that notice was given to the appellant to appear before the Court on June 13th, it must have been given to him under the provisions of Section 7 of Act IX of 1873, as notice of a time fixed for hearing him or his pleader in support of his petition of appeal.

On June 13th, the Judicial Assistant dismissed the appeal in default.

We are of opinion that the Judicial Assistant was not competent to dismiss the appeal in default; that he was bound, the appeal having been registered, to consider the decision of the lower Court, and if it appeared to him correct, to confirm it (in which case a second appeal would have lain from his order of confirmation), or if it appeared to him incorrect, to send intimation of the appeal to the lower Court under Section 343 of the Code (if that had not already been done), and to fix a date for the hearing of the appeal under Section 344, and to affix notice of such date in the Court House, and issue notice to the respondent under Section 345. He was not competent to dismiss the appeal for default of prosecution, because Section 346 applies only to cases in which a date has been fixed under Sections 344 and 345 for the hearing of the appeal and not to a case under Section 7 of Act IX of 1873. There is nothing in that Section which renders it obligatory upon an appellant, whose appeal has been registered, to appear in support of his petition, or which authorizes the Appellate Court to dismiss

the appeal for default. The only power given to the Court by that Section is a power to confirm the decision of the first Court in lieu of sending intimation of the appeal to that Court and issuing notice to the respondent, under the provisions of Act VIII of 1859.

In omitting to consider whether the decree of the first Court should be confirmed or not, the Judicial Assistant has failed to exercise a jurisdiction vested in him by law, and we are, therefore, competent, under Section 622 of Act X of 1877, to set aside his order dismissing the appeal in default and to direct him, as we hereby do, to take up the petition of appeal again upon a date of which the appellant shall have notice and pass an order thereon, either confirming the decision of the lower Court, or that a date be fixed for hearing the appeal of which notice shall be given to the respondent.

We treat the petition of appeal to this Court as an informal application under Section 622; but as the appellant has been mistaken in his procedure we give him no costs of the proceedings in this Court.

No. 49.

APPELLATE SIDE.

DOULATYA AND BHAGWANA,—(Defdts.),—APPELLANTS,
Versus
KHEMAN AND BIHARI,—(Plaintiffs),—RESPONDENTS.

Case No. 81 of 1878.

(SMYTH AND ELSMIE, JJ.)

Act IV of 1872—Sections 7 and 10—Custom—Pre-emption—Mortgage—Found by the custom of mouza Majri, Tahsil and Zilla Umballa, that the right of pre-emption extends to mortgages; and held, following No. 53 *Punjab Record* 1877, that effect must be given to such custom under Section 7, Act IV of 1872, notwithstanding Section 10 of that Act.

*Regular appeal from order of Commissioner, Umballa Division,
dated 22nd October 1877.*

This was a claim to a right of pre-emption in respect of a mortgage of 19 bigas of land in mouza Majri, Tahsil and Zilla Umballa. The Court of first instance dismissed the suit on the ground that Section 10, Act IV of 1872 did not allow a right of pre-emption in respect of temporary alienations.

The Commissioner, on appeal, reversed the first Court's judgment and decreed the claim, in the following judgment:—

"It is clearly recorded in the *wajib-ul-arz* that the right of pre-emption extends to mortgages. There is nothing in Act IV of 1872 regarding pre-emption that sets aside this right, which is established by the custom of the village."

From this order the defendants appealed to the Chief Court. The judgment of the Court was delivered by

SMYTH, J.—There is an entry in the *wajib-ul-arz* to the effect that the right of pre-emption extends to mortgages as well as to sales. The defendants' answer, in which they stated that the mortgage was offered to all the co-sharers in the village, also supports the allegation of plaintiffs that by local custom the right of pre-emption extends to mortgages. That being so, we consider that under Section 7, Act IV of 1872, effect must be given to the custom, and in so holding we follow the decision of this Court in *Punjab Record* for 1877, No. 53. 11th May 1878.

It does not appear, however, that according to the provisions of the *wajib-ul-arz*, Behari is entitled to the right as he is not a *kherwadtar*. We therefore so far modify the Commissioner's decree as to confine it to Kheman alone; and he must lodge the mortgage money in the Court of first instance within one month from the date of his being informed of this order by the Deputy Commissioner. The date of his being so informed should be recorded: subject to this modification the defendants' appeal is dismissed. The parties will bear their own costs in this Court.

No. 50.

SODHI INDAR SING,—(Plaintiff),—APPELLANT,

Versus

BHAGA AND OTHERS,—(Defendants),—RESPONDENTS.

} APPELLATE SIDE.

Case No 153 of 1878.

(SMYTH AND ELSMIE, JJ.)

Tenancy Act, XXVIII of 1868, Sections 2 and 11—Enhancement of rent—Agreement.—Defendants held certain land under an agreement, dated 10th August 1853, the terms of which were also embodied in the *wajib-ul-arz* of the village, entitling them to hold the land for ever as cultivators, giving a certain share of the produce to plaintiff. In a suit brought by plaintiff, held that he was not entitled to enhancement of rent under Section 11, by reason of Section 2, Act XXVIII of 1868.

*Regular appeal from order of Commissioner, Lahore Division,
dated 31st October 1877.*

Protal Chandar Chatterji for Appellant.

The judgment of the Chief Court was delivered by

SMYTH, J.—This was a suit for enhancement of rent, and the Commissioner holds that it is not maintainable. We find that the land originally belonged to the defendant's ancestors, and as they were unable themselves to arrange for its cultivation and pay the Government revenue, they made it over in proprietary right to plaintiff's father on certain terms, which are 22nd May 1878.

detailed in the document of 10th August 1853. The defendants were to hold the land for ever as cultivators, and to give a certain share of the produce to plaintiff. Terms to the same effect were embodied in the *wajib-ul-urz*, the fourth Section of which provided that the rates of rent specified in the *khatoni* should be paid for ever by the defendants.

Under these circumstances, we consider that the case comes under Section 2 of the Tenancy Act, and that the provisions of Chapter III of that Act, relating to enhancement of rent, are not applicable here.

The rate of rent has been fixed by agreement, and according to the agreement plaintiff is not entitled to a decree for enhancement.

Appeal dismissed with costs.

No. 51.

APPELLATE SIDE.

{ GANGA RAM & KASHMIRI MAL,—(Plffs.),—APPELLANTS,
Versus
{ RALLA MAL & JAMEYAT MAL,—(Defdts),—RESPONDENTS.

Case No. 920 of 1878.

(SMYTH, J.)

Custom—Alienation—Ancestral house property—Khatris of Jullundur.—Found that no custom existed restraining the alienation of ancestral house property by Khatris of the town of Jullundur at the instance of possible reversioners related in the fifth degree from the alienor.

Special appeal from order of Additional Commissioner, Jullundur Division, dated 20th March 1878.

Plaintiffs sought to set aside an admission made by one Ralla, that a certain house which they asserted to be his, was really the property of Jameyat, as the admission was made in collusion with Jameyat, and with the view of defeating the reversionary claims of the plaintiffs, whom, if Ralla died without heirs, they said they would be entitled to succeed.

The points which plaintiffs set out to prove were:—

I.—That there existed a custom in Jullundur City which entitled reversioners, as distant as they are (five generations off), to intervene and prevent alienations of ancestral property to their prejudice.

II. That in point of fact, the house in question was really Ralla's and not Jameyat's, though held by the latter in mortgage.

The plaintiffs produced certain evidence to the alleged custom; but none at all to the second issue: the Court, therefore, held that it was useless to decide the first issue which related

simply to the law bearing on the facts, which facts the second issue was directed to bring out.

The plaintiff, Ganga Ram, is a professional "*arzi navis*," (and the first Court held) presumably well acquainted with the procedure of the Courts and the laws of evidence, and he was assisted by a Pleader, of whom the Court wrote that he was one of the ablest in Jullundur, yet the only evidence to the second issue which he attempted to put forward was the record of certain other cases, in which the parties were not all the same, and evidence in which was not admissible under Section 33 or 32 of the Evidence Act.

The first Court, under these circumstances, held that, as there was an adjournment for production of the evidence required, and plaintiffs were not only themselves educated men, but assisted by a professional Pleader of ability, they could not expect a further adjournment in a case which had already been before the Courts, in one form or another, for years, and refusing the indulgence of a further adjournment, dismissed the case.

From this order, plaintiffs appealed to the Additional Commissioner who gave judgment as follows:—

"I consider that, under Section 158 of Act X of 1877 and 148 of Act VIII of 1859, the Court was certainly justified in dismissing the case in absence of the required proof of the second issue, and the Court's action ought not to be interfered with, under these circumstances, unless a very clear case of hardship is apparent; but in this instance, beyond the fact that the plaintiff and his Pleader ought to have arranged their case better, is this important one, that I do not regard the proof adduced to the existence of a custom restraining alienation of house property by Khatriis of the town of Jullundur at the instance of possible reversioners related in the fifth degree from the proprietors, as satisfactorily proved at all. No doubt such custom of restraint on the alienation of ancestral lands on the part of zamindars who are childless, has been admitted possibly too freely in our Courts; but the peculiar village customs which are regarded as having brought about this state of things amongst the agricultural community, are not generally recognised in towns and in connection with shops and dwelling houses.

"The appeal is therefore dismissed with costs."

On special appeal to the Chief Court, the appeal was rejected at a preliminary hearing by the following order of

SMYTH, J.—After perusing these papers and questioning the appellants, I consider that ground for special appeal is not made out. 21st June 1878.

The Additional Commissioner finds the question of custom against the plaintiffs, and there is no sufficient reason to suppose that this finding is erroneous. Appeal dismissed.

No. 52.

KHANA,—(Plaintiff),—APPELLANT,

Versus

HOSSEIN KHAN AND FAIZ MAHOMED KHAN,—(Defdts.),

RESPONDENTS.

} APPELLATE SIDE.

Case No. 852 of 1877.

(FITZPATRICK AND PLOWDEN, JJ.)

Limitation Act, IX of 1871, Section 15—Suit instituted in wrong Court.—Proceedings before Revenue Officer.—Plaintiff applied in 1875, in respect to the land in suit, to the Deputy Commissioner, as Revenue Officer, to be settled with, on which proceedings were taken which remained pending some time. The present suit for possession was admittedly barred, unless the period during which those proceedings were pending could be excluded under Section 15, Act IX of 1871, in computing the period of limitation.

Held that the application of 1875 was not a suit founded upon the same right to sue as the present and in good faith instituted in a wrong Court, and, therefore, that the time during which the revenue proceedings were pending could not be excluded in computing the period of limitation.

Regular appeal from order of Commissioner, Umballa Division, dated 9th March 1877.

Rattigan for Appellant.

Kali Prosono Roy for Respondents.

The facts, so far as they are material to this report, are sufficiently stated in the judgment of the Chief Court which was delivered by

FITZPATRICK, J.—Mr. Rattigan, who appears for the plaintiff, appellant, admits that the suit is barred by lapse of time unless the plaintiff is allowed a deduction, under Section 15 of the Limitation Act of 1871, in respect of the time during which certain proceedings instituted by him in the Court of the Deputy Commissioner on the 30th August 1875, remained pending.

9th Novr. 1877.

We are clearly of opinion that no such deduction can be allowed. The proceedings in question were simply proceedings taken on an application to be settled with, made to the Deputy Commissioner as Revenue Officer.

It is utterly out of the question to contend that such an application (which we may observe related to a matter expressly excluded by Section 65 of the Land Revenue Act from the cognizance of the Civil Courts) was a *suit founded upon the same right to sue as the present and in good faith, i. e., with due care and attention, instituted in a wrong Court.*

We dismiss the appeal with costs.

No. 53.

APPELLATE SIDE. { GOUHAR AND OTHERS,—(Defendants),—APPELLANTS,
Versus
FAZLA AND OTHERS,—(Plaintiffs),—RESPONDENTS.

Case No. 1460 of 1877.

(PLOWDEN AND SMYTH, JJ.)

Occupation of land by person without title—Erection of buildings—Delay on part of owner in bringing suit—Acquiescence—Relief to which occupier without title is entitled.—Defendants occupied and erected *katcha* buildings upon land belonging to the plaintiffs. After a period of 6 or 7 years plaintiffs sued to eject the defendants from the land. *Held* that defendants were not entitled to continue in possession of the *katcha* buildings but were entitled to remove the materials thereof.

Mere delay on the part of an owner of land in suing a person in possession without title, who erects buildings on the land he has illegally occupied, does not entitle the possessor to be maintained in possession. The particular relief to which a possessor so situated is entitled must depend upon the circumstances of the case.

Regular appeal from order of Commissioner, Rawalpindi Division, dated 14th July 1877.

The plaintiffs in this suit sought to eject defendants from 34 *kanals* 6 *marlas* of land occupied by them, which was partly under cultivation, and partly sites of houses built by the defendants, in which they reside. The first Court found that, beyond all doubt, the defendants had illegally occupied and made use of the land attached to the shrine, of which the plaintiffs are custodians. In this finding the Commissioner, on appeal, concurred. Both Courts also held that the occupation of the houses had lasted for some 6 or 7 years and that the houses were *katcha* buildings.

The first Court's order was not quite clear as regards possession of the land, other than the sites of the houses. As to the latter, the Court distinctly refused to give possession to the plaintiffs, but decreed them Rs. 10-8-0 as compensation for the sites, leaving the defendants in occupation of the houses they had erected on the ground of their long residence in them. The Court also awarded Rs. 7-13-0 to the plaintiffs as the profits from cultivation of the land, which item was virtually a decree for mesne profits, which the plaintiffs did not claim.

On appeal by the plaintiffs, the Commissioner held that the first Court erred in holding that the defendants could not be ousted and in leaving them in possession of their houses. "The defendants," he said, "with their eyes open built the houses on *wuqf* land. They must make good to the shrine its property."

The Commissioner then decreed the ejectment of the defendants from the land under cultivation and remitted the case to the first Court for disposal as to the houses and their sites, observing that he saw three ways out of the difficulty. First, that the defendants should quit their houses retaining the right to

remove the wood-work: second, that they should deliver possession to the plaintiffs receiving the price of the wood-work: third, that they should continue in possession paying rent to the plaintiffs.

The defendants appealed to the Chief Court, insisting that they could not be ousted by plaintiffs after an occupation of 6 or 7 years.

The judgment of the Chief Court was delivered by

LOWDEN, J.—It is quite clear that the whole of the land in *12th Feby. 1878.* suit is the property of the plaintiffs, in their capacity of managers of the shrine. The defendants have occupied it with their eyes open, and erected upon part of it *katcha* buildings which they have occupied for some years, and have cultivated the rest of the land, with the knowledge of the plaintiffs.

We are of opinion that, under these circumstances, the defendants cannot successfully resist the demand of the plaintiffs for possession of the land, including the sites of the houses erected upon it.

The leading case on the equitable rights of persons occupying and building on land owned by another person is the judgment of a Full Bench of the High Court of Calcutta in the case reported at *VI S. W. R., 228, (S. C. Sup. Vol. B. L. R., F. B., 595.)*

The rule laid down in that case is that, according to the usages and customs of the country, buildings and other such improvements made on land do not by the mere accident of their attachment to the soil become the property of the owner of the soil. If he who makes the improvement is not a mere trespasser, but is in possession under any *bonâ fide* title or claim of title, he is entitled either to remove the materials, restoring the land to the condition in which it was before the improvement was made or to obtain compensation for the value of the building if it is allowed to remain for the benefit of the owner of the soil, the option of taking the building or allowing the removal of the material remaining with the owner of the land in those cases in which the building is not taken down by the builder during the continuance of any estate he may possess.

The case which led to this ruling was one in which the person sought to be ejected was in possession of land as proprietor and had erected *pukka* buildings thereon, and had claimed a right to pull down the buildings and remove the materials.

The ruling, it is to be observed, only defines the right of *bonâ fide* possessors, and does not treat of the effect of acquiescence, or make any distinction between *pukka* and *katcha* buildings. We notice the case because it furnishes a broad general rule, equitable and capable of application in many cases, although it does not provide specifically for such a case as is now under consideration. It is, however, applicable to the present case to this extent, that the defendants, upon the facts we find, cannot be entitled as of right to any better position than *bonâ fide* possessors would have under the general rule prescribed.

Mere delay on the part of an owner of land in suing a person in possession without title who erects buildings on the land he has

illegally occupied does not entitle the possessor to be maintained in possession. This has been very lucidly explained by Mr. Justice Turner in a ruling of the Allahabad High Court reported at *p. 82, I. L. R., 1 All.*

The particular relief to which a possessor so situated is entitled, must, we consider, depend upon the circumstances of the case. *Primâ facie* the owner of the land is entitled to recover possession and the circumstances must be very strong to justify an order in favour of the non-proprietor's claim to retain possession without the consent of the owner. On the other hand, the circumstances must be very strong against the possessor to preclude him from claiming any compensation whatever for the improvements he may have made, or from being indemnified to some extent for his outlay.

In a case reported at *III S. W. R., 71*, where acquiescence on the part of the owner was not proved, it was held that he was entitled to possession of the land against the defendant, a trespasser, the latter being left at liberty to remove the materials of the house; and the defendants' claim to remain in possession paying rent was disallowed.

In the case at *XVI S. W. R., 161*, a decree for possession was given to a plaintiff who had stood by and allowed the defendant to construct a building on his, the plaintiffs' land, it being found that the building was not substantial and had not cost much, and that the materials might be removed without difficulty.

The cases we have just cited, taken in connection with the general rule, suffice to show that, under the circumstances of the case before us, the defendants are not entitled to insist upon continuing in possession of the *katcha* buildings they have erected, while they are entitled to remove the materials of these buildings, if they be minded to do so.

We are unable, therefore, to accept this appeal and reverse the Commissioner's order in so far as it leaves it possible that the defendants shall be ejected upon such terms as the first Court may decree, in pursuance of the directions given by the Commissioner in remitting the case.

The Commissioner's order, as is apparent from the observations we have made, still leaves it open to the first Court to decree that the defendants shall remain in possession on condition of paying rent, and against this order no objection has been preferred by the plaintiff. We do not, therefore, find it necessary to modify the Commissioner's order, but as it is not final, and the decree of the first Court will be open to appeal up to this Court, we have stated in some detail the law applicable to this case, for the guidance of the first Court, which may now be briefly summarised as follows.

The defendants are entitled at least to remove their materials and to have a reasonable time (say a month) to do so. The plaintiffs may elect to retain the buildings erected, but in that case they must pay such compensation as the Court shall direct, after enquiry into their present value, if they insist upon ejecting the defendants. If they are content to permit the defendants to remain in possession, the latter consenting to this course, the

parties should be left to settle for themselves the terms upon which the occupation shall continue, and the suit for possession should be dismissed, so far as it relates to the buildings.

In regard to the land other than that occupied by the buildings, the order of the Commissioner is upheld.

As the appeal of the defendants virtually fails in its object, it must be dismissed with costs.

No. 54.

NANAK CHAND,—(Defendant),—APPELLANT,

Versus

SAIN DITTA,—(Plaintiff),—RESPONDENT.

} APPELLATE SIDE.

Case No. 1061 of 1877.

(PLOWDEN, SMYTH AND ELSMIE, JJ.)

Jurisdiction—Valuation of pre-emption suit for purposes of—Held by the Full Bench, that suits to enforce a right of pre-emption must as a rule be valued according to the market value of the property in respect of which the right is claimed, for the purpose of determining whether the suit falls within the pecuniary limits of the jurisdiction of a particular Court.

Civil judgment No. 62 *Punjab Record*, 1875, overruled.

Held by the Division Bench, where the Tahsildar, having jurisdiction up to Rs. 300, entertained a suit for pre-emption in respect of property the market-value of which was found to be at least Rs. 800, that the suit was beyond the jurisdiction of the Tahsildar.

Special appeal from order of Additional Commissioner, Jullundur Division, dated 24th April 1877.

Bates for Appellant.

Rivaz for Respondent.

This was a claim to enforce a right of pre-emption to certain land and a house, which had been sold for Rs. 800. The value of the house was given at Rs. 100 in the plaint, and the value of the land at Rs. 142-4-8, computed in accordance with clause 6, Section 7 of the Court Fees' Act, 1870. The suit was instituted in the Court of the Tahsildar of Jullundur who had jurisdiction in suits to the value of Rs. 300. The Tahsildar decreed the claim on payment of Rs. 800, which plaintiff, before him, had agreed to pay. The Judicial Assistant on appeal dismissed the suit as barred by limitation.

The plaintiff thereupon appealed to the Additional Commissioner. Before that officer, the objection was raised by defendant that the Tahsildar had no jurisdiction over the suit. The Additional Commissioner apparently was of opinion that the Tahsildar had no jurisdiction, but considered himself bound to follow the decision of the Chief Court reported as No. 62, *Punjab Record*, 1875.

On the question of limitation, the Additional Commissioner reversed the order of the Judicial Assistant, and accordingly restored that of the Tahsildar.

The defendant accordingly appealed to the Chief Court.

Bates, for appellant, contended that the Tahsildar had no jurisdiction to entertain the suit, the value of the subject-matter of the suit being more than Rs. 300, which sum was the pecuniary limit of the Tahsildar's jurisdiction. He cited the cases reported at pp. 538 and 543, *I. L. R.*, 1 *Bom.*

Rivaz, for respondent, relied upon the ruling of the Chief Court No. 62, *Punjab Record*, 1875, which had been followed by the Additional Commissioner.

The case was heard by Plowden and Smyth, JJ., and referred to a Full Bench by them in the following order which was delivered by

2nd April 1878. PLOWDEN, J.—With reference to the Bombay cases quoted, and the case at *XII B. L. R.*, 115, which was a suit for pre-emption in which the point now raised was considered, we think that there is sufficient doubt thrown upon the soundness of the ruling of the Division Bench of this Court, to justify our referring the question involved to the Full Bench of the Court for reconsideration.

The question we refer is:—In what manner is a suit to enforce a right of pre-emption to be valued, for the purpose of determining whether it falls within the pecuniary limits of the jurisdiction of the Court in which the suit is instituted?

The judgment of the Full Bench (Plowden, Smyth and Elsmie, JJ.) was delivered by

16th April 1878. PLOWDEN, J.—With reference to the cases cited in our order of reference, to the terms of Section 17 of Act IV of 1872 (the Punjab Laws' Act) as to the form of decree to be made in a pre-emption suit under that Act, namely, a decree directing the defendant to sell the property in respect of which the right is claimed to the plaintiff at the fair market-value, and to the fact that in practice a pre-emption suit ordinarily prays for possession conditionally upon payment of the market-value, we consider that such suits must, as a rule, be valued according to the market-value of the property in respect of which the right is claimed, for the purpose of determining whether the suit falls within the pecuniary limits of the jurisdiction of a particular Court.

This case will be returned to the Division Bench for disposal.

The case was remitted back to the Division Bench (Plowden and Smyth, JJ.), when the following judgment was delivered by

16th April 1878. PLOWDEN, J.—The market-value of the property in suit has been held in this case to be at least Rs. 800, and the suit was therefore, under the ruling of the Full Bench upon the reference made in, our order of the 2nd April, beyond the jurisdiction of the Tahsildar.

The order of the Lower Courts must accordingly be reversed and the case be tried *de novo* by a Court of competent jurisdiction. We send the case for this purpose to the Court of the Judicial Assistant, Jullundur.

The stamp on this appeal will be refunded, and all other costs up to date will be costs in the cause and follow the event.

No. 55.

SHADI,—(Plaintiff),

Versus

MUSSAMMAT AISHAN & SHAHABUDDIN,—(Defendants).

} REFERENCE SIDE.

Case No. 2 of 1878.

(PLOWDEN AND SMYTH, JJ.)

Plaint, return of, after trial on the merits—Power of Appellate Court.
An Appellate Court has power to direct the return of a plaint, notwithstanding a trial upon the merits in the first Court, if it be found that such Court ought to have returned it under Section 57 (a) of Act X of 1877.

Case referred by the Judge Small Cause Court, Amritsar, under Section 617, Act X of 1877.

Stated case.—The plaint presented here is the same that was presented in the District Court on which the lengthy investigation was made and a decree followed. In the Appellate Court, on the plea that the District Court was without jurisdiction, the decree was cancelled and the plaint was returned to the plaintiff by the Appellate Court to present to the Small Cause Court if he chooses.

The question is, whether this Court can accept such a plaint. There has been no ruling on this point. It is quite clear from Act X of 1877 that no plaint can be returned after registration, inasmuch as there is no provision on the point except in Section 20 relative to staying proceedings. The rules for returning plaints are laid down in Sections 53 and 57.

The Chief Court distinctly ruled under the old Code, No. 39 of 1872, that a plaint could not be returned after decree, but in two subsequent cases it ordered the return of the plaint.

There is thus a conflict of rulings and as the point is an important one, I beg to refer it to the Chief Court for decision, *viz.*, can a plaint on which an investigation and decree have followed be accepted by another Court on its being returned to the plaintiff by the Appellate Court?

The judgment of the Chief Court was delivered by

PLOWDEN, J.—On the facts stated, we are of opinion that an Appellate Court is competent to pass an order directing the return of a plaint to the plaintiff, notwithstanding a trial upon the merits in the Court of first instance, if it be found by the Appel- 3rd May 1878.

late Court that the first Court ought to have returned the plaint under Section 57 (a) of Act X of 1877, on the ground that the suit was exclusively cognizable by a Small Cause Court.

No. 56.

APPELLATE SIDE. { SHAH MUHAMMAD,—(Plaintiff),—APPELLANT,
Versus
MUSSUMMAT IMAM BIBI & KARM DAD,—(Defendants),—
RESPONDENTS.

Case No. 1864 of 1877.

(PLOWDEN AND SMYTH, JJ.)

Khana damad (resident son-in-law)—Succession—Custom—Gujrat.—
Found by the custom of Parganah Gujrat, that a son-in-law, who has been brought up and married in his father-in-law's house, has lived there continuously to his death, and been joint in cultivation with him, is entitled to succeed to his land with the consent of the widow and in accordance with the expressed desire of the deceased proprietor.

Special appeal from order of Commissioner, Rawalpindi Division, dated 4th October 1877.

Bates for Appellant.

This was a claim to cancel a gift of land in mouza Shadiwal, Tahsil Gujrat.

The plaintiff, as nephew of Nur Muhammad, deceased proprietor, claimed to succeed to the land in preference to Nur Muhammad's son-in-law, Karmdad. It appeared that the deceased Nur Muhammad took Karmdad as a regular *khana damad*, and that he had lived with him and cultivated his land for 28 years. His wife, Nur Muhammad's daughter, was still alive and there were several children all born in Nur Muhammad's house. Nur Muhammad's widow recently made a gift of the land to Karmdad.

The lower Courts were of opinion, under the circumstances, that there was *prima facie* reason to suppose that it was Nur Muhammad's intention to make a gift of his land to his son-in-law, though he died without doing so formally, and that the widow in making the disputed gift was merely carrying out her late husband's wishes; and finding that custom was not opposed to such transfers, they upheld the gift.

Bates, for appellant, contended that no custom had been established to validate the gift and that Karmdad, having inherited his share of ancestral land, was not entitled to succeed to the land in dispute as *khana damad*.

The judgment of the Chief Court was delivered by

3rd May 1878.

PLOWDEN, J.—After hearing counsel for the appellant, we consider that he has failed to establish sufficient ground for an order directing the re-opening of the enquiry into this case.

Both the Lower Courts in deciding the case have adverted to custom and we find no ground for supposing that further enquiry would shew that a son-in-law who has been brought up and married in his father-in-law's house, has lived there continuously to his death, and been joint in cultivation with him, is incompetent to succeed to his land with the consent of the widow and in accordance with the expressed desire of the deceased proprietor.

Custom in the Punjab generally is in favour of the succession of a *ghar damad*, under circumstances such as are found in this case, and the extract from the *riwaj-i-am* filed with the record favours the recognition of a right of succession in *ghar damads* in the parganah of Gujrat, from which this case has come.

The appeal is dismissed with costs.

No. 57.

ILAHIA AND 2 OTHERS,—(Defendants),—APPELLANTS,	} APPELLATE SIDE.
<i>Versus</i>	
SADHARA AND 5 OTHERS,—(Plaintiffs)—RESPONDENTS.	

Case No. 33 of 1873.

(SMYTH AND ELSMIE, JJ.)

Act IX of 1873, Section 5—Second regular appeal—Modification on point material to merits of case.—Plaintiffs in the first Court obtained a decree for possession of land on payment of compensation to defendants for a building thereon, the materials of which, however, defendants were allowed the option of removing in lieu of compensation. The plaintiffs appealed to the Judicial Assistant, who modified the order of the first Court by setting aside that part of it awarding compensation, reserving liberty to the defendants to remove the materials of the building. At the same time the Judicial Assistant dismissed a cross-appeal brought by defendants.

Held that the Judicial Assistant's decision on plaintiffs' appeal modified the decision of the first Court on a point material to the merits of the case, and, therefore, under Section 5, Act IX of 1873, a second regular appeal on the whole case lay to the Commissioner.

Special appeal from order of Commissioner, Lahore Division, dated 29th October 1877.

Kali Prosono Roy for Appellants.

Tara Balab Chatterji for Respondents.

The Court of first instance gave plaintiffs a decree for possession of the land in dispute on condition of paying compensation to the defendants for the building thereon, the option being allowed to defendants to remove the materials of the building in lieu of compensation.

The plaintiffs appealed to the Judicial Assistant on the ground that defendants were not entitled to receive compensation but only to remove their materials.

The Judicial Assistant accepted the appeal of the plaintiffs, and gave plaintiffs a decree for possession of the land, with liberty to defendants to remove the materials of the building. At the same time and by the same decision, the Judicial Assistant dismissed a cross appeal which had been brought by the defendants.

From this decision the defendants brought a second regular appeal to the Commissioner, in which they sought to re-open the whole case on the merits, but the Commissioner considered that he could not hear the appeal as it did not relate to the question of compensation, which was the only question on which there had been a difference of opinion between the two Lower Courts.

The defendants accordingly appealed to the Chief Court.

The judgment of the Court delivered by

8th May 1878.

SMYTH, J.—The first objection taken in appeal is that the Commissioner erred in refusing to give a decision on the merits of the case. We think that this objection must prevail.

We consider that the Judicial Assistant's decision on plaintiffs' appeal modified the decision of the first Court on a point material to the merits of the case, and, therefore, under Section 5, Act IX of 1873, which was the law in force at the time, it was competent to the Commissioner to receive a second appeal on the whole case.

We accordingly accept this appeal and remand the case to the Court of the Commissioner for decision of the appeal which was instituted in his Court on the merits.

The stamp on this appeal will be refunded; the other costs of this appeal will be costs in the cause and will follow the result.

No. 58.

ABDUL MAJID,—(Defendant),—APPELLANT,

Versus

FAZL HAQ,—(Plaintiff),—RESPONDENT.

APPELLATE SIDE. {

Case No. 1730 of 1877.

(PLOWDEN AND SMYTH, JJ.)

Civil Procedure Code (Act VIII of 1859) Sections 98 and 376.—Decree on confession—Review—Agent, authority of, to confess judgment—Circumstances under which principal is entitled to relief.—On 24th February 1877, plaintiff instituted a suit against defendant to establish his right to the office of Diwan of the khangah of Miran Sahib at Thuska, and to share in the management of the institution. Defendant was summoned for 20th March 1877 for settlement of issues. On 7th March 1877, before the summons was served, defendant's general agent or muktar, Mahomada Shah, appeared and confessed judgment, upon which a decree was passed in favour of plaintiff.

On 29th March 1877 defendant, through his pleader, applied for review of judgment on the grounds that, 1st., the decree on confession of judgment had been passed before the date fixed for hearing, and 2nd., that the confession of judgment had been made without defendant's consent or authority.

The application was rejected on the ground that Mahomada Shah's power of attorney gave him power to confess judgment and bind defendant.

Held by Smyth, J., following No. 37, *Punjab Record*, 1877, that defendant was entitled to relief, unless it could be shown that the agent was in point of fact expressly or impliedly authorized to make the confession of judgment sought to be impeached.

Held by Plowden, J., that even if the power of attorney was sufficient in itself, and without any further instrument of authorization to confer upon the agent authority to confess judgment generally, the defendant would be entitled to relief if he could show that the general authority had in the particular case been exercised in such a manner or with such results that it would be unjust to hold him bound by his agent's act.

Per Plowden, J. Under the Code of Civil Procedure, a decree by consent may be set aside by review if the attainment of the ends of justice require it, and, therefore, that if it appeared that the confession of judgment had been made by the agent under such circumstances that it operated as a fraud upon the defendant, or was made in error or acted as a surprise upon him, he would be *prima facie* entitled to the relief sought.

Special appeal from the order of Commissioner, Umballa Division, dated the 26th October 1877.

Spitta for Appellant.

Ludlam and Kali Prosono Roy for Respondent.

The defendant in this case is the Sajada Nashin of the Khangah of Miran Sahib at Thuska in the Umballa District. On the 15th October 1876, he presented an application to the Deputy Commissioner of Umballa, stating that he had suspended his general mukhtar, Walli-ulla, and that any suits which might thereafter be instituted by Walli-ulla in defendant's name should not be heard, and praying that Walli-ulla might be called upon to deliver up the seal which he held and any papers in his possession relating to the Khangah. Orders were passed on this petition on the 17th October 1876. On the 18th October 1876, Walli-ulla died leaving a son aged two years, the present plaintiff Fazl Haq.

On the 24th February 1877, Fazl Haq, through his agents, instituted the present suit against the defendant to establish his right to the office of Diwan of the Khangah and to share in the management of the institution. In his plaint he stated that the office had been held for generations by his ancestors, that it was hereditary in his family, and that very extensive powers pertained to it.

The plaint came before the Extra Assistant Commissioner, Partab Sing, who, on the 5th March 1877, recorded an order summoning the defendant to appear on the 20th March for the settlement of issues. On the 7th March, before the summons was served, the defendant's general agent or mukhtar, Mahomada Shah, attended in the Extra Assistant Commissioner's Court and filled an *ikbaldawa* or confession of judgment, in which he admitted plaintiff's claim in full, and expressly stated that the office of Diwan was hereditary in plaintiff's family, and that the Diwan could not be dismissed; and that it was through a mis-apprehension that the defendant had dismissed plaintiff's father in the preceding October. The Extra Assistant Commissioner accepted the *ikbaldawa* and gave plaintiff a decree, declaring his right to the office of Diwan.

That was on the 7th March. On the 11th March, the summons which had been previously issued for service on the defendant was served on his agent, Mahomada Shah, and the Nazir reported that it could not be served on defendant personally because he was absent from the village. On the 29th March, the defendant, through his pleader, Mr. Miller, applied for review of the judgment of the 7th March on the grounds, 1st., that the *ikbaldawa* had been accepted and judgment passed before the date fixed for hearing, and 2nd., that the *ikbaldawa* had been filed without the defendant's consent or authority. The application for review came before Mr. Pitcaithly, Extra Assistant Commissioner, who refused to grant it, holding, as regards the second ground, that Mahomada Shah's power of attorney gave him authority to file the *ikbaldawa* and to bind the defendant by its provisions.

The defendant then appealed to the Commissioner on the ground, among others, that his agent, Mahamada Shah, acted beyond the scope of his authority in confessing judgment. The Commissioner considered that, by the terms of the power of attorney, Mahomada Shah had power to confess judgment, and dismissed the appeal.

From this order the defendant accordingly appealed to the Chief Court.

The following judgments were delivered.

9th May 1878.

SMYTH, J.—(After shortly stating the facts, continued.) In special appeal to this Court it is urged for the defendant, appellant, that the Lower Court was wrong in law in holding that the appellant, under the circumstances of the case, is bound by the confession of judgment filed by his agent, whereby valuable rights were relinquished before he had received notice of the suit.

The question which is raised in the present cases is similar to that which was raised in the case of *Bansi Lal v. Twigge*, (No. 37, *Punjab Record* for 1877), where it was held by this Court that an agent who was conducting a suit on behalf of his principal and who relinquished a part of the claim, was not authorised to make such relinquishment, and, therefore, that his principal was not bound by it. The question for consideration in all such cases appears to be whether the agent was, in point of fact, expressly or impliedly authorized by the principal to make the admission or file the confession which the principal afterwards seeks to impeach.

In the present case, the extent of the agent's general authority was defined by the terms of the *mukhtarnama* of the 5th February 1877. That document is substantially as follows :—
 “Whereas I, Abdul Majid, have frequently occasion to appear as
 “a party in civil and other suits in different Courts, and I cannot appear personally; therefore I have appointed my Peer Bhai,
 “Mahomada Shah to be my general mukhtar, so that in every case
 “instituted, whatever questions he may put, or whatever questions
 “he may answer, or whatever petitions he may present, or if he
 “writes any *ikrarnama*, or if he appoints a mukhtar or vakil, or
 “produce or take any document (*sannad*), or if he execute to any

"one, or cause to be executed to me, any transfer of land, whether temporary or permanent, or receive money for me from the treasury, besides the above, all acts done by him of whatever nature shall be accepted and ageed to by me as if they had been done by me personally."

The terms of the above document are no doubt extremely wide, wider in many respects than those under which the authority was given to the agent in Bansi Lal's case. Still, I do not think that this document, the primary object of which was to enable Mahomada Shah to appear in Court on behalf of Abdul Majid and prosecute and defend suits generally in his name, can be safely held sufficient of itself in any particular case to support a finding that authority was given to Mahomada Shah to relinquish the claim or to abandon the defence altogether in such case, or that it operates to estop Abdul Majid, under all circumstances, from repudiating such acts of his agent. Authority of that kind is not given by the deed in express terms, as, judging from the numerous acts recited in the deed, we should expect it to have been, if it had been intended to be given. Moreover, the relinquishment of a claim, or the waiving of a right, seems to me to be an act different in kind from any of the acts specified in the deed. A power to do an act of that kind would be more nearly allied to a power to make a gift of the principal's property. But could it be contended that the agent, though expressly empowered by the deed to effect permanent transfers of his principal's land, could in any particular case and without consulting his principal, make a free gift of that land to a stranger? So, although the agent was empowered to conduct suits, it cannot I think be contended that his general authority extended so far as to enable him, without consulting his principal, to give up the subject of the suit altogether.

It may be observed also, that, although the deed is careful to specify particular acts which the agent may do in the conduct of suits, it contains no special reference to such acts as the filing of *razinamas* or *ikbal-dawas*. I think, therefore, following the ruling of this Court in Bansi Lal's case, we should hold that Mahomada Shah had not authority, merely by virtue of his power of attorney, to file a confession of judgment.

It was alleged that Mahomada Shah did not act merely of his own motion in filing the confession of judgment, but that, in filing it, he acted with the knowledge and consent and by the verbal direction of his principal, and it was added that defendant had given him his seal to affix to the instrument to show that he acted in this particular matter with his (defendant's) authority. That question has not been considered by the Commissioner, and hardly at all by the first Court. The fact that Mahomada Shah had defendant's seal does not of itself seem to be a point of much weight, as it would appear from the defendant's application of 15th October 1876 that he used to leave his seal with his *mukhtar*. Still, if the case goes back for enquiry and fresh decision, it might be desirable to enquire and decide whether defendant did, in point of fact, and not merely by the general power of attorney, authorize Mahomada Shah to confess judgment in this instance on his behalf.

I would accept this appeal and remand the case to the first Court for enquiry and decision on the above point, and, in the event of its being found that defendant did not authorize his agent to file the confession of judgment, for enquiry and decision on the merits. Costs up to date to be costs in the cause and to follow the result.

9th May 1878.

LOWDEN, J.—I concur in holding that this special appeal must be accepted, and the case remanded to the first Court.

The defendant applied for a review of judgment and decree passed upon an *ikbaldawa* filed by one Mahomada Shah, who holds a general power of attorney from him. One of the grounds for the application was that "Mahomada Shah had not authority to make the confession of judgment." Now, both the Courts have disposed of this question upon a consideration of the terms of the *mukhtarnama*, treating it as conclusive both upon the question of the agent's authority and of the defendant's title to the relief he sought.

I think the Courts have failed to comprehend their own powers and the defendant's position.

An application for review of judgment in respect of any decree may be made for any good and sufficient reason (Section 376), and it shall be granted if the Court is of opinion that the review is requisite for the ends of justice (Section 378). A decree passed under Section 98 upon an agreement or a compromise is not excepted from the operation of either of the above quoted Sections, and may, therefore, like any other decree, be reviewed, if it appear requisite for the ends of justice.

In the present case, the Courts, by rejecting the application, have virtually decided that a review is not requisite for the ends of justice, and they have done so without investigating the circumstances under which the *ikbaldawa* was made and filed by the defendant's agent.

They have treated the case as depending solely upon the contents of the *mukhtarnama*, whereas, in reality, the contents of the *mukhtarnama* was only one of the matters to be considered. Assuming the *mukhtarnama* to give the agent a general authority to admit claims, its existence and even the presence of the defendant's seal in the hand of the agent was quite consistent with the revocation of the authority conferred by its terms, and with the allegation of the defendant that Mahomada Shah had no authority to make, in the particular case, the confession of judgment which he did make.

The defendant does not appear to have been required in either Court to state specifically the circumstances under which he alleges the *ikbaldawa* to have been prepared and filed; but until those circumstances are ascertained no satisfactory decision can be given on the defendant's claim to have the decree set aside. Whether or not the defendant's agent had authority to file the *ikbaldawa* presented by him on the defendant's behalf in this case, is a question of fact to be determined, not merely by reference to the terms of the *mukhtarnama*, but to the circum-

stances, when they are ascertained, under which that document, the *ikbaldawa*,* was made and presented, and this admittedly has not yet been done.

When this has been done, it may be found that, even if it be held that the *mukhtarnama* is sufficient in itself and without any further instrument of authorisation to confer upon the agent authority to confess judgment generally, yet the general authority has, in the particular case, been exercised in such a manner or with such results that it would be unjust to hold the defendant bound by his agent's act.

Under the Code of Civil Procedure, as I have pointed out, even a decree by consent may be set aside if the attainment of the ends of justice require it. But the defendant's substantial allegation is that he did not in reality consent to the decree in this suit. If it should appear that the *ikbaldawa* had been made and given by the agent in this case under such circumstances that it operated as a fraud upon the defendant, or was made and given in error or acted as a surprise upon him (as for instance if made without reference to him, such reference being practicable and to be expected), he would *prima facie* be entitled to the relief he seeks, especially if it should appear that he had a good defence upon the merits, and that the decree would work him serious injury, personally, or in his official position.

I do not wish in any way to anticipate the results of a further investigation ; but I cannot but observe that the defendant brings to notice matters which lend sufficient colour to his assertion that he is entitled to relief, to justify an order for further investigation.

The defendant came promptly to ask for relief; the proceedings in which the *ikbaldawa* was given were conducted with remarkable and unusual haste ; and that special instrument of authorisation which, as it would appear from the Commissioner's judgment, the agent ought to have been furnished with in order to represent the defendant in Court, and which it was the duty both of the Court and the plaintiff to require to be produced before they accepted an agent's appearance instead of that of the defendant himself, was not forthcoming. The Commissioner's observation that the defendant cannot complain of the absence of the instrument is correct only, if the defendant is to be blamed for not giving it. But he cannot be blamed for this until it is shown that he, intending to be represented by his general agent in this suit for the purpose of filing this *ikbaldawa*, omitted wilfully or inadvertently to give him a special *mukhtarnama*, nor while the point in issue, *viz.*, whether the agent was in fact authorised to act as he did, is still undecided.

If he was, if the defendant knew and approved of his agent's proceedings, there must be very exceptional circumstances in the case to entitle him to be released from the consequences of his own act, done at his desire by his agent's hand, and certainly the omission to give his agent a formal instrument of authorisation is not a circumstance on which he can successfully rely.

According to the allegations of the counsel for the parties before us, it is asserted on one side that the defendant was not

cognizant of his agent's action in respect of the plaintiff's claim ; and it is asserted on the other that he was aware of the suit and positively sanctioned the very *ikbaldawa* filed in Court.

That, then, is the first and main question to be decided, and the contents of the general *mukhtarnama* have an exceedingly remote bearing upon its decision,—so remote in my opinion that I do not think it necessary to decide whether the terms of that instrument give a general authority to confess judgment.

I think that this case should be remanded for a full investigation of the circumstances under which the *ikbaldawa* filed in Court was prepared and presented by the agent on the defendant's behalf. When that enquiry has been made, the Court will be in a position to decide whether there is good and sufficient cause shewn by the defendant, whether it is requisite to the ends of justice that the decree and the *ikbaldawa* should be set aside, and the defendant allowed to defend the claim upon the merits. If the Court consider that there is, the decree should be set aside and the claim heard upon the merits.

In making an order for rehearing, the Court can make such order as it considers just in regard to compensating the plaintiff for any costs incurred by him owing to negligence or carelessness on the defendant's part, of which the filing of the *ikbaldawa* was the consequence.

No. 59.

REVISION SIDE.

{ MEHTAB RAI AND ANOTHER,—(Defdts.),—PETITIONERS,
Versus
NANAK CHAND,—(Plaintiff),—RESPONDENT.

Case No. 282 of 1878.

(SMYTH, J.)

Civil Procedure Code, Section 622—Jurisdiction—Limitation.—Held that the plea of limitation is not a question of jurisdiction within the meaning of Section 622, Act X of 1877.*

Petition under Section 622, Act X of 1877, for revision of the order of the Judge Small Cause Court, Lahore, dated 13th April 1878.

17th May 1878.

SMYTH, J.—This application is made under Section 622, Act X of 1877, on the ground that the suit was barred by limitation, and that, therefore, the Judge had no jurisdiction to try it. But the case of *Payne v. Constable* (I. B. L. R., Or. Jur., 49,) shows that lapse of time does not oust the jurisdiction of the Court, and that the defence of limitation is not a question of jurisdiction. Application refused.

* So also held by Plowden, J. in Miscellaneous Civil Petition No. 217 of 1878.

No. 60.

KADAR ALI BY HIS MOTHER AND GUARDIAN MUSSAM-
MAT AMANI KHANUM,—(Plaintiff),—APPELLANT,

Versus

} APPELLATE SIDE.

SIKANDAR ALI & ANOTHER,—(Defdts.),—RESPONDENTS.

Case No. 522 of 1878.

(SMYTH, J.)

Mahomedan Law—Custom—Inheritance—Sons and Grandsons—Right of representation.—S. A., died leaving him surviving K. A., a son, and two grandsons S. and M. the sons of A. A., who predeceased his father S. A. In a suit by K. A. claiming, under Mahomedan Law, the entire estate of S. A. deceased.

Found that custom recognized the right of representation, and therefore, that the grandsons were not excluded from inheriting.

*Regular appeal from order of Commissioner, Hissar Division,
dated 5th February 1878.*

Protul Chander Chatterji for appellant.

This was a claim to the estate of Sher Ali deceased in Mouzah Kharkhonda, Tahsil Sampla, Zillah Rohtak.

The facts of this case are fully stated in the following judgment which was delivered on appeal by the *Commissioner (Colonel McMahon)*.

The first question which arises in this appeal is whether the suit is *resjudicata*. The lower court has held that it is so on two grounds.

Sher Ali deceased had three sons, one Kadar Ali (plaintiff) by Mussammat Amani Khanum, another Asghar Ali by his first wife. There was also a third son Zabar Ali. Zabar Ali and Asghar Ali predeceased their father. Asghar Ali died, leaving issue Sikandar Ali and Moshraf Ali, the two defendants.

Sher Ali made a gift of his land and dwelling house to Mussammat Amani Khanum and her infant son, the present plaintiff.

On the 25th of March 1870, Sher Ali applied for mutation of names in favor of Mussammat Amani Khanum, but it was correctly refused under paragraph 11 of Financial Commissioner's Book Circular 47 of 1860 on the ground that the transfer was not an *accomplished fact*. The *intention* to transfer the property was present in Sher Ali's *mind*, but the transfer had not as a *matter of fact* taken place.

The Lower Court considers that Article 45 of Act XV of 1877 bars the suit.

I do not think Article 45 applies to the order in the *Dakhil Kharij* proceedings. The order was not an *award* under Regulation VII of 1822 upon the merits of a dispute; it was simply the refusal of an executive officer to record in a register that a certain

transfer of landed property *had* taken place, when, as a matter of fact, the transfer had not actually taken place.

The next case was a suit brought against the present defendants by Mussammat Amani Khanum in 1875. She claimed 84 yards of Sakani land with the materials on it, on the basis of a deed of gift executed in 1862. The only question decided in that case was the validity of the *deed of gift*.

I do not think that the suit of 1875, bars the present suit, which is a claim to the whole of the estate of Shere Ali by way of *inheritance*. The question of inheritance has never been gone into. If the plaintiff is the lawful son of Shere Ali he is obviously entitled to his share of his father's property, and he has a right to come into court now and ask the court to determine whether he is or is not the lawful son of Shere Ali; and, if he is, what share of the inheritance he is entitled to take.

It would be unjust to hold that he is to lose the *status* and *inheritance* of a son, because his mother was advised to claim a small portion of paternal property under a deed of gift.

I notice, in passing, that Shere Ali executed two deeds of gift; *viz*, one on the 20th November 1862 in favor of Mussammat Amani Khanum granting her a Haveli. The suit of 1875 had reference to this deed of gift.

The 2nd deed of gift was executed on the 16th May 1870, in favor of Mussammat Amani Khanum and her son Kadir Ali, and was intended to pass to them $61\frac{4\frac{1}{2}}{20}$ Bighas of land and a *makan* and Haveli distinct from that covered by the deed of 1862.

The property in litigation in this suit includes the subject-matter of both deeds of gift.

I now pass on to consider the merits of the case.

The first point to be considered is whether the plaintiff Kadar Ali is legitimate or not.

It is admitted that Mussammat Amani Khanum had a husband before she married Shere Ali. The plaintiff contends that the first husband of Mussammat Amani Khanum divorced her. The defendants contend that he did not, and bring some witnesses to support their contention.

These witnesses relate some tittle tattle said to have been gleaned up at Sonapat some 18 or 20 years ago. I do not think their evidence is worthy of serious attention. Mussammat Amani Khanum lived with Shere Ali some 18 years, and there is nothing to show that her first husband ever turned up during that period. There is evidence to prove her marriage (*nikah*) with Shere Ali, whilst the latter in his registered deeds of gift, executed in 1862 and 1870, and in his deposition before the Tahsildar on the 2nd April 1870 speaks of her as his lawful wife ("*Zouja Mankuha*" literally married wife—wife married by the legal rite of *nikah*) and in the last two documents he speaks of the plaintiff Kadir Ali as his son. That Shere Ali openly acknowledged the latter as his son is admitted by the defendants' own witness Fida Hossein. I think then that under the circumstances the only

sound conclusion to come to is that, in the absence of reliable proof to the contrary, Mussammat Amani Khanum was the lawful wife of Shere Ali, and the plaintiff Kadir Ali is his legitimate son. Mere acknowledgment under the Mahomedan Law would appear to be sufficient, vide page 405 Baillie's Digest, to establish the latter point.

The question which follows is, to what share is the plaintiff entitled.

The plaintiff contends that the case is governed by pure Mahomedan Law and that as Asghar Ali and Zabar Ali predeceased their father Shere Ali, the plaintiff Kadir Ali is entitled to take the whole estate.

I observe that the question whether the family is bound by Mahomedan Law, or by custom, was raised and decided in favor of custom in the suit of 1875, above referred to. The Judicial Assistant has also in this case come to the same conclusion. I concur. I think the balance of evidence proves this and establishes, in particular, that according to local custom, the death of a son during the life time of his father does not cut off the son's children from their father's share in the inheritance.

Both parties in this court admit that if the death of Asghar Ali during his father's life time, is not held to prejudice the sons of Asghar Ali, and if the plaintiff is held to be legitimate, then the sons of Asghar Ali are entitled to $\frac{1}{2}$ of the estate, and the plaintiff Kadir Ali to $\frac{1}{2}$ the estate.

I accept the appeal and decree to the plaintiff half of the 5th Feby. 1878. landed and house estate sued for, with costs.

From this order the plaintiff appealed to the Chief Court.

Protul Chander Chatterji for appellant contended :—

1st, that the appellant's family being Syuds and strict Mahomedans of the Sunni sect, followed the Mahomedan Law, and,

2nd, that no custom contrary to the law had been satisfactorily proved.

The appeal was rejected at a preliminary hearing by the following order of

SMYTH, J.—I have perused the record, and have heard appellant's counsel, and I do not find any reason to think that the concurrent opinion of the two lower courts as to the custom superseding the law is erroneous.

I therefore dismiss this appeal.

No. 61.

REVISION SIDE.

{ KANHYA, BAHADUR, & OTHERS,—(Defdts.), PETITIONERS,
Versus
 { BAHADUR ALI & OTHERS,—(Plaintiffs),—RESPONDENTS.

Case No. 565 of 1877.

(SMYTH AND ELSMIE, JJ.)

*Civil Procedure Code (Act VIII of 1859), Section 346.—Appeal.—Dismissal for default on date of which appellant had no notice.—*The Judicial Assistant Amballah fixed the 7th June 1877 for hearing an appeal filed in his Court. On 10th May 1877, the date was altered to 22nd May 1877, and the parties ordered to be informed. On 22nd May 1877, neither party being present the appeal was dismissed for default, though notice of the change of date had not been served upon them. *Held*, that in hearing the appeal on 22nd May 1877, the Judicial Assistant exercised a jurisdiction not vested in him by law.

Petition under Section 35 of Act XXIII of 1871, for revision of the order of the Judicial Assistant Commissioner Amballah, dated 7th June 1877.

Rivaz for petitioners.

Suraj Bal, Pundit, for respondent.

The facts are fully stated in the judgment of the Court which was delivered by,

16th Feby. 1878.

SMYTH, J.—In this case when the appeal was filed in the Judicial Assistant's Court, the 7th June 1877 was fixed for the hearing. But on the 10th May 1877, the date was altered to the 22nd May, and it was ordered that the parties should be informed. On the 22nd May 1877, neither party being present the appeal was dismissed for default. On the 28th May the Nazir reported that the parties could not be found at their village, and were in consequence not informed. It was stated, however, that notice was given in their houses on the 21st.

The appellant subsequently applied to the Judicial Assistant to have the appeal restored to the file, but the application was rejected.

We consider that in hearing the appeal on the 22nd May, the Judicial Assistant exercised a jurisdiction not vested in him by law, for the parties had received no notice that that day was fixed for the hearing.

The counsel for the respondent has nothing to urge in support of the order of the 22nd May, and we set it aside, and direct the Judicial Assistant to restore the appeal to his file and hear it on the merits, after giving due notice to the parties.

The costs of this proceeding will be borne by the parties.

Much confusion has arisen in this case by reason of the judgment in another case having been placed with the record and headed with the names of the parties to the present case.

No. 62.

MOBARAK AND 5 OTHERS,—(Plaintiffs),—APPELLANTS, }

Versus

} APPELLATE SIDE.

TAJA,—(Defendant),—RESPONDENT.

Case No. 1538 of 1877.

(PLOWDEN and ELSMIE, JJ.)

Custom—Childless village proprietor—Gift of entire estate by, in presence of collaterals.—Found that, by the custom of Mouza Chak Chuhar in the Gujrat district, a childless village proprietor has power to make a gift of his land to whom he pleases.

Regular appeal from order of Commissioner Rawalpindi Division, dated 23rd July 1877.

This was a suit for possession of certain land in Mouza Chak Chuhar, Tahsil Phalian, Zillah Gujrat, the property of Jafar, deceased.

Defendant was the husband of the only daughter of Jowaya, brother of Jafar, whom he predeceased. Defendant had lived with Jowaya and his brother Jafar for 20 years.

Nine years previous, Jafar and Mussammat Gouhar Bibi, Jowaya's widow, made defendant a gift of the land belonging to both the brothers and he had held possession. Alladin a blood relative sued defendant for the land in 1874, and obtained a decree for Jowaya's share on the ground that Mussammat Gouhar Bibi had no power to give away her late husband's land. Defendant however retained possession of the land given him by Jafar.

The plaintiffs, six in number, by different branches united back in one Shada, the common ancestor of themselves and Jafar and of Jowaya who had died without male issue.

The Court of first instance decreed the claim, holding the gift contrary to custom; apparently on the ground that as it had been held invalid in the case of half the land given by Mussammat Gouhar Bibi, it ought to be equally invalid in the case of that given by Jafar.

The defendant appealed to the Commissioner who gave judgment as follows:

"I think the lower Court is wrong in considering the registered deed of gift by Jafar invalid, even though the gift by Gouhar Bibi may have been so. The appellant lived with Jafar and Jowaya for 18 or 20 years, before the death of the former, and managed the land for them, and he has been in possession of the land ever since the gift was made, though the land was not transferred to his name until Mussammat Gouhar Bibi died. I think that the decree taking from him the half of the land given to him by Gouhar Bibi was justified by the fact that she had no power to

confer a title to the land. But such is not the case with Jafar's gift. And the plaintiffs in the present case seem to have even acknowledged that at the time the other case was tried, *vide* their evidence in that case. I accept the appeal, and reversing the order of the lower court, dismiss the plaintiffs' claim."

From this order the plaintiffs appealed to the Chief Court. The judgment of the Court was delivered by

21st Feby. 1878.

LOWDEN, J.—The validity of the gift, if made, was not questioned in the first Court by the plaintiffs, nor is it questioned before us by Mobarak, who alone of the appellants is present.

He only contests the fact of the gift having been made, and not the power of Jafar, a childless proprietor to give his land to whom he pleased. The decision in the former case in no way affects the decision of this, as the first Court appeared to consider, for the gift there relied on was by a widow, to her husband's brother's son-in-law, and the clause of the *Riwaj-i-am* cited, related only to gifts by widows.

As to the fact of the gift, there is no room for doubt. The deed of gift is produced, it is registered, and Jafar the donor attended at the Registry office. Moreover, he admitted the fact in the *Dhakhlil Kharij* proceedings of 1868.

The appeal is dismissed with costs.

No. 63.

APPELLATE SIDE. {	SYAD PIR SHAH,—(Plaintiff),—APPELLANT,
	<i>Versus</i>
	GULAB SHAH AND OTHERS,—(Defdts.),—RESPONDENTS.

Case No. 1524 of 1877.

(LOWDEN AND ELSMIE, JJ.)

Evidence Act 1 of 1872, Section 65—Public document—Secondary evidence other than certified copy—Admissibility of—when document is lost.—Held that secondary evidence of a lost public document, other than a certified copy, is admissible upon proof of loss or destruction of the original, and further proof that no certified copy of the original is available to the party seeking to prove the contents of the original.

Held further, that so long as the original is in existence, no secondary evidence other than a certified copy is admissible.

Special appeal from order of Commissioner Rawalpindi Division, dated 19th July 1877.

Protul Chandar Chatterji for appellant.

In this case, the Courts below dismissed the claim on the ground that it had been previously thrown out by a Court of competent jurisdiction. The record of the former case had been lost, and in order to ascertain what was the effect of the judgment,

the parties were examined, and certain case registers belonging to the office of the Deputy Commissioner were referred to.

Protul Chandar Chatterji, on special appeal, contented that the Courts below had erred in admitting such secondary evidence of the previous judgment, as, under Section 65 (e) of the Evidence Act, the only secondary evidence admissible was a certified copy.

The following judgments were delivered,

ELSMIE, J.—It has been argued in this Court that under Section 65 e, of the Evidence Act the only secondary evidence of a judgment of the Civil Court which can be received, is a certified copy, and it would certainly seem that the present law has made no express provision for cases in which two causes for the non-production of original documents are combined, as in the present instance, where the original has been lost (Section 65 c), and where it was also a record of a Court of Justice (e). Before the passing of the Evidence Act I of 1872, the High Courts both of Calcutta and Allahabad have held, that secondary evidence could be ad-

14th March 1878.

VII. W. R., p. 18.

I. N. W. P. report, p. 78.

mitted to show the terms of a lost decree or paper on a Judicial record. Public documents are defined in Section 74 of the Evidence Act. These documents are such as are *prima facie* available for reference, e. g., the records of the acts of Judicial officers for the non-production of at least copies of which ordinarily no good cause could be shown. In the present instance, however, the record of the act of the Extra Assistant Commissioner who decided the case on the 27th July 1876, has become for the purposes of reference non-existent. To hold that the terms of the former decree cannot now be proved save by the production of that decree, or a certified copy, would be tantamount to saying that, if a district record office were burnt down and its contents destroyed, none of the decrees which were therein contained would be of any force whatever, unless in cases where the persons interested had been fortunate enough to secure copies before the fire.

I cannot think that such a result could have been contemplated by the legislature. On the contrary, there appears to be no difficulty in holding that the public documents referred to in Section 74 are documents which are ordinarily to be found in the custody of public officers, and not such as have become lost, stolen, or destroyed and thereby ceased to be available for reference. Under this view then, it only remains to be considered whether there was legal evidence before the lower courts that the decree of the 27th July 1876 did in fact render the present claim answerable by the plea of *resjudicata*. I do not think that the evidence sufficed for the purpose. The previous claim was in regard to 714 Ghomas 3 Kanals 12 murlas. The present is for 1,050 beegas, and there is nothing on the record to show that, according to the standard of land measurements in Gujrat, these amounts are virtually the same. Moreover, the description of the claim, correction of settlement record, as found in the registers is very vague, and it is *prima facie* improbable that plaintiff would have brought a fresh suit in the terms of his old claim, after so short a lapse of time. It is to be observed that his admission that he

had brought a similar action, was followed by an immediate assertion that he had been directed to alter the form of his plaint, and apply for relief of a somewhat different nature. On the whole case, I think the evidence is not legally sufficient to show that the claim was barred by Section 2, Act VIII of 1859. I would accept the appeal and remand the case to the district Court with reference to the preceeding remarks, and as the circumstances are unusual, I would suggest that the re-investigation be conducted by an experienced European officer, who should seek for all available evidence in regard to the terms of the old decree; should examine the officials of the Court in which it was passed, and, if necessary, the Extra Assistant Commissioner, Syad Barkat Ali, and should refer to the original registers and generally spare no effort to discover the truth. I have the less hesitation in proposing this remand as it is obvious that the original record has probably been only mislaid, and it may yet be found if the Deputy Commissioner thinks proper to direct a strict search to be made.

The parties will bear their own costs of appeal.

14th March 1878. PLOWDEN, J.—On the question whether the evidence admitted was legally admissable I concur in holding that it was.

To construe the provisions of clauses *e* and *f* of Section 65 of the Indian Evidence Act as extending to public documents, which had been lost or destroyed, as well as to existing documents, and excluding all secondary evidence of them, except certified copies in the former as well as in the latter case, would involve a repugnancy between clause *e* and clause *c* of the same Section, which is so general in its terms as to admit secondary evidence of any kind of any lost document whether public or private. Now any construction involving repugnancy is to be rejected in favor of any other which the language will naturally bear. Both provisions will I think have full scope for their operation, if it be held that secondary evidence of a lost public document, other than a certified copy, is admissible upon proof of loss or destruction of the original, and further proof that no certified copy of the original is available to the person who seeks to prove contents of the original, holding at the same time that, so long as the original is in existence, no secondary evidence other than a certified copy is admissible.

This interpretation is consonant with the law of evidence in India as it was applied before the Evidence Act was passed, agrees with the English law upon which the Indian Act is founded (See *I Taylor Ev*: 504 and 505 and cases at 2 Phill 203), averts as my learned colleague has pointed out highly inconvenient consequences, which might otherwise follow, and is not excluded by the structure of the Section.

As to the second point, I also concur in thinking that the evidence adduced was not legally sufficient to establish that in the previous suit, the same cause of action had been heard, and been determined. It does not prove that the cause of action was the same, and for all that appears to the contrary, the former suit may have been dismissed upon some collateral or preliminary

point, or even with directions to bring the present suit, and not have been decided upon the merits.

I concur in the order of remand proposed by my learned colleague.

No. 64.

MALAWA MAL AND SOHAWA MAL,—(Pltiffs.),—APPTS.

Versus

DALA MAL,—(Defendant),—RESPONDENT.

} APPELLATE SIDE.

Case No. 1045 of 1877.

(PLOWDEN AND ELSMIE, JJ.)

Act XI of 1863, Section 6—Small Cause Court—Jurisdiction—Moveable property—Title deeds—Suit for recovery of.—Plaintiffs sued to recover the title deed of a house valued at Rs. 250, on the allegation that they had purchased the house through the defendant who retained the purchase deed against their will. *Held* that the suit was one to recover moveable property, cognisable by a Court of Small Causes, and therefore, that no special appeal lay.

Special appeal from order of Commissioner Lahore, dated 12th April 1877.

Protul Chandar Chatterji for appellants.

Ram Narain, Pundit, for respondent.

The respondent's pleader in this case took a preliminary objection that no special appeal lay, the suit being one of the nature cognisable by a Court of Small Causes.

The judgment of the Chief Court was delivered by,

PLOWDEN, J.—The suit is one for recovery from the defend- *21st March 1878.*
ant of a title deed of a house at Lahore valued at Rs. 235, on an allegation that the plaintiffs had purchased the house through the defendant, and that the latter retains the purchase deed against their will.

It is objected that the suit is for personal property under Rs. 500 in value, and that therefore no special appeal lies.

We think this contention is correct and must prevail. There is no ground for holding that in this country a title deed savours of the realty, and is to be deemed to belong to any kind of property, but that in which all documents would naturally be classed, without reference to their contents, namely as moveable property.

This is expressly recognised by the Limitation Act in Articles 33 and 34 of Schedule I, which relate, Article 33, to suits for wrongfully detaining title deeds, and Article 34 to suits for wrongfully detaining *any other* moveable property, so in the Specific

Relief Act 1877, Section 10, relating to suits for the possession of specific moveable property, the first illustration given is of a suit for recovery of title deeds.

Again in Section 7, Clause IV (a) of the Court Fees Act of 1870, "documents" relating to title are given as an instance of moveable property having no market value.

There are numerous cases to show that the terms "personal" and "moveable" property are for the purposes of Section 6 of the Small Cause Court Act synonymous terms lastly, we find that there has been a decision directly on the point, in which a lease was held to be moveable property, and a suit for its recovery to be cognisable in a Small Cause Court, see Millett's S. C. Ct. Act, p. 38, Gopinath and Hurcomar Mitter, *M. S. S.*, November 10th 1868.

The objection is allowed, and this special appeal rejected, the order admitting it being set aside as improvidently made.

The appellant will pay the respondents costs of this appeal.

No. 65.

APPELLATE SIDE. {	KHAN MULLA,—(Plaintiff),—APPELLANT,
	<i>Versus</i>
	FAZLUR, RAHMAN, & OTHERS,—(Defendants),—RESPONDENTS.

Case No. 1,169 of 1877.

(PLOWDEN AND SMYTH, JJ.)

Act IV of 1872, Section 14—Pre-emption—Relationship—Hereditary occupant of land sold.—Plaintiff claiming a right of pre-emption was collaterally related in the 8th degree to the vendors, while the vendees were collaterally related in the 9th degree, and were also hereditary cultivators of the land sold, and had been in possession of it for a long time. On the latter ground the Courts below dismissed the plaintiff's suit. *Held* by the Chief Court that the plaintiff being nearer in the order of relationship, was entitled to a decree, under Section 14, Act IV of 1872.

Special appeal from order of Civil Judge Peshawar, dated 11th May 1877.

Kali Prosono Roy for appellant.

The facts are sufficiently stated in following judgment which was delivered by—

16th April 1878.

SMYTH, J.—The question for decision in this case is whether the plaintiff has a preferential right of pre-emption to the defendants (vendees) in respect of the land in dispute. Both the plaintiff and the vendees are co-sharers in the village in which the land is situate, and it is found by the Civil Judge and is admitted by the parties that the plaintiff is one degree nearer in order of

relationship to the vendor than the vendees. But on the ground that the vendees are hereditary cultivators of the land, and have been in possession of it for a long time, the Civil Judge upheld the decision of the Extra Assistant Commissioner, by which plaintiff's claim to pre-emption was dismissed.

This is a case in which I should have been glad to uphold the decisions of the lower Courts, if the law had left us any discretion in the matter, as both plaintiff and the vendees are only distant relations of the vendor, all three being descended in the 3rd or 4th generation from three brothers, while the vendees are the hereditary cultivators of the land. The law however is clear on the point, Section 14, Act IV of 1872 providing that, in the absence of custom to the contrary, the right belongs to co-sharers in the village in order of relationship to the vendor. Here no special custom was alleged, and on questioning the parties before us they did not pretend to say that there is any custom. That being so, I think the plaintiff is entitled to a decree for pre-emption, for the words 'order of relationship,' in the section above cited, do not permit of any construction by which a person collaterally related in the 9th degree can be said to be on an equal footing with a person collaterally related in the 8th degree.

There is no dispute as to the market value of the property. I would therefore accept this appeal and give plaintiff a decree directing defendants to sell the property to the plaintiff at Rs. 140, the purchase money to be paid into court by plaintiff on or before the 60th day from the day on which he is informed of this order by the Deputy Commissioner of Peshawar.

Defendants to pay plaintiff his costs in this litigation.

LOWDEN, J.—concurred.

No. 66.

GULAM HAIDAR & OTHERS,—(Defendants),—APPELLANTS,	} APPELLATE SIDE.
<i>Versus</i>	
SIKANDAR KHAN AND OTHERS,—(Plaintiffs),—RESPONDENTS.	

Case No. 1639 of 1877.

(LOWDEN AND ELSMIE, JJ.)

Alienation by Widow—Suit to set aside—brought by distant reversioner—Waiver by nearest reversioner.—Plaintiff's distant reversioners, sued to cancel a mortgage made by a Mahomedan widow, with a life interest only in her deceased husband's estate,—*held*, that the suit was not maintainable in the absence of proof that the immediate reversioner had waived or abandoned his rights in favor of plaintiffs.

Civil judgment No. 39 of 1876, *Punjab Record* commented on and explained.

*Regular appeal from order of Commissioner Jalandhar Division,
dated 27th August 1877.*

Protal Chandar Chatterji for appellants.

Spitta for respondents.

This was a suit to cancel a mortgage by the widow of a Mahomedan Rajput, of land situate in Mouza Serali, Tahsil Philor, in the district of Jalandhar.

It was admitted that the plaintiffs, who objected to the mortgage, were not the nearest reversioners. A genealogical tree dated 1st May 1877, which was admitted to be correct in the first Court, showed that the plaintiffs were very distantly connected with Karm Baksh, the deceased husband of the mortgagor, while several descendants of Mahmud Khan the paternal uncle of Karm Baksh were alive, and had not preferred an objection.

The first Court, following case No. 39 of the *Punjab Record* for 1876, held that as the nearest reversioners had not come forward, they must be considered to have either abandoned or waived their rights. The right of the plaintiffs to sue was therefore allowed, and after an enquiry into the question of the legal necessity of the mortgage, a decree declaring that it should only operate against plaintiffs' inheritance to the extent of Rs. 635 was passed.

The Commissioner, to whom both parties appealed, cancelled the mortgage altogether as being fraudulent and collusive and without valid reason.

From this order the defendants appealed to the Chief Court.

The following judgments were delivered,

16th April 1878.

ELSMIE, J.—I am unable to hold that this case is on the same footing as No. 39 of 1876.

In that case 2 nephews objected to a gift of ancestral land made by their paternal uncle, in favour of his daughter's son, and there may have been some reason for supposing that the nearer reversioner had waived his right in favor of the nephews.

Here, however, the connection between the plaintiffs and Karm Baksh, deceased, is of a very remote degree,—they seem to be separated by some 18 or 20 degrees, and I fail altogether to see that the circumstances of the case are such as to raise a presumption that the descendants of Mahmud Khan have waived their right in favour of the plaintiffs. It is possible that they may have assented to the alienation.

It has been urged for the respondents that the fact of the plaintiffs being sharers in the patti to which the widow belongs, gives them a superior right to the sons of Mahmud Khan to object to alienation. There is nothing however in the *wajib-ul-arz* to show that any such custom prevails. I would accept the appeal and dismiss the claim with costs: and I may add that the Commissioner appears to have been clearly in error in cancell-

ing the mortgage altogether. It would seem that the utmost for which the plaintiffs, even had they been next heirs, could have prayed was a declaration that the mortgage should not prejudice their right of inheritance.

PLOWDEN, J.—I concur in holding that this suit is not *16th April 1878.* maintainable by the plaintiffs.

The general rule is that a suit for a declaratory decree, brought in order to protect the inheritance, must be brought by the next reversioner.

This Court in No. 39 of *Punjab Record 1876*, has decided that an exception may be made to this rule, when the suit is brought by a more distant reversioner in whose favour the last reversioner has waived or abandoned his rights. The report of the case in *Punjab Record 1876* is not explicit, but it is clear from the authority which that case follows, that is the ruling in 10 Bombay High Court, p. 351, that the right abandoned or waived is the reversionary right in the property and not merely the right to sue, and that there must be proof of the abandonment or waiver recorded. I point this out because I understand the first Court to have held, on the supposed authority of No. 39 *Punjab Record 1876*, that the mere non-claim of the next reversioners to set aside the mortgage entitled the more remote reversioners to sue.

The objection to the competency of the plaintiffs to maintain their suit was taken in the first court, and the plaintiffs took no measures to bring the nearest reversioners upon the record or to establish, by evidence, that the latter had waived their rights in favor of the plaintiffs. In this court they have procured a petition from Hayat Khan, one of the next reversioners, stating that the plaintiffs alone have no right to claim, and he has no objection to their claim.

This petition was presented after the appeal had been argued and judgment reserved, and even if we were disposed to give effect to it, it would be of little use to the plaintiffs, as Hayat Khan is not the sole reversioner.

The plaintiffs have not, I think, shown any sufficient ground why the present suit should not be dismissed altogether, on the ground that they are not the immediate reversioners, without prejudice to any suit which they may bring, if the immediate reversioners resign their rights of reversion in the plaintiffs favor.

The appeal is accepted and the suit dismissed with costs throughout.

No. 67.

GANDA MAL,—(Plaintiff),—APPELLANT,

Versus

APPELLATE SIDE. {

MUSSAMMAT MEHTABO, GUARDIAN OF BHOLA AND
KAKA MINORS,—(Defendants),—RESPONDENTS.

Case No. 1537 of 1877.

(PLOWDEN AND ELSMIE JJ.)

Court Fees' Act VII of 1870, Section 7, Clauses V (b) and (d), and Section 12, Clause I—suit for possession of a share in a joint Khata—Valuation—Appeal.—Plaintiff sued for possession of 214 kanals 8 marlas of land on the allegation that defendants sold it to him for Rs. 1,500, gave him possession and subsequently dispossessed him. The sale deed conveyed to defendant no specific land, but seven-fifteenths of Khata No. 409, which was a joint Khata comprising 460 kanals 10 marlas of land. The Courts below rejected the plaint on defendant refusing to file additional stamps as on a suit valued in accordance with Section 7, Clause V (d) of the Court Fees' Act 1870. Plaintiff appealed, insisting on his right to value the suit at five times the jumma under Section 7, Clause V (b), when a preliminary objection was taken that the appeal was barred by Section 12, Clause I.

Held by the Chief Court that the appeal was not barred, as the question was not merely one relating to valuation for the purpose of determining the amount of fee chargeable on the plaint, but whether a particular article of Clause V of Section 7 applied to the suit, (a).

Held further, that the defendants' prayer really was for possession jointly with the defendants of Khata No. 409, with an interest therein to the extent of seven-fifteenths, and that the whole Khata being part of an estate paying annual revenue to Government and recorded in the collector's register as separately assessed with revenue, within the meaning of Clause V (b), the value of the suit must be deemed to be five times the revenue payable on the Khata.

*Special appeal from order of Commissioner Lahore Division,
dated 22nd June 1877.*

Cullin for appellant.

Ram Narain, Pundit, for respondents.

The facts are sufficiently stated in the head note and in the Judgment of the Chief Court, which was delivered by,

22d April 1878. PLOWDEN, J.—A preliminary objection is taken by Pundit Ram Narain, that this appeal does not lie, the order of the Commissioner being final under Section 12 Clause 1 of the Court Fees' Act, and he quotes the recent ruling of the Bombay High Court at I. L. Report, 2 Bombay, page 146. We are of opinion that the Section quoted does not apply, as the question is not merely one relating to valuation for the purpose of determining the amount of fee chargeable, but whether a particular article of paragraph 5 of Section 7 of the Court Fees' Act applies to this suit. The decision of the Calcutta High Court at vol. 19 Suth. Weekly Reports, page 214, and of the High Court of the North-

(a) See Indian Law Reports, 1 Allahabad, p. 361, to same effect, and 2 Bombay, p. 146, *contra*,

West Provinces at Indian Law Report, 1 Allahabad, page 361, seem not to have been brought to the notice of the Bombay High Court in the case above mentioned. There is also a decision of this Court No. 42 of *Punjab Record* 1874, which supports the view that we take of the effect of Section 12.

The objection is therefore over-ruled.

It appears that the present suit is brought for possession of 214 kanals 8 marlas of land, situate in Mouzah Kokri Kalon, Zilla Ferozepore.

The allegation is that the defendants sold the above land to the plaintiff, gave him possession and subsequently dispossessed him. The plaintiff filed a registered deed of sale, in proof of his title, and upon turning to this we find that the deed conveys to him no specific land but seven-fifteenths of Khata, No. 409, which is a joint Khata and comprises 460 kanals 10 marlas of land.

It is therefore clear that the plaintiff's prayer is for possession, jointly with the defendants, of Khata No. 409, with an interest therein to the extent of 7-15ths.

Upon this view of the case, we are of opinion that article (b) of para 5 of Section 7 of the Court Fees' Act applies.

The whole Khata is, we consider, part of an estate paying annual revenue to Government and recorded in the collector's register as separately assessed with revenue within the meaning of para 5 of that Section. The value of the land for possession of which the suit is brought must therefore be deemed to be 5 times the revenue payable upon Khata No. 409, which is stated to be Rs. 40-13-4, or Rs. 205 in all.

We accordingly accept this appeal and remand the case to the first Court.

That Court will direct the plaintiff to file stamps to the total value of Rs. 15-12-0, and if this be done, will proceed to determine, upon the merits, the question of the plaintiff's right to possession of the land in suit. If it be not done, the court will reject the plaint.

No costs of this appeal or the appeal in the Commissioner's Court to either party.

No. 68.

BADHAWA, HIRA & LABHA,—(Plaintiffs),—APPELLANTS,
Versus
 GANDHELLA & 5 OTHERS,—(Defendants),—RESPONDENTS.

} APPELLATE SIDE.

Case No. 1064 of 1877.

(PLOWDEN AND ELSMIE, JJ.)

Khana damad, or resident son-in-law—Ancestral property of natural family, right to claim share in—Custom.—Held, no custom to the contrary

being proved, that a *Khana damad* (resident son-in-law) or his descendants are not precluded from claiming a share in the ancestral property of their natural family, merely by reason of the fact that such *Khana damad* had succeeded to the estate of his father-in-law.

*Regular appeal from order of Commissioner, Ambalah Division,
dated 23rd April 1877.*

Protul Chandar Chatterji for appellants.

Bates for respondents.

This was a claim to possession of certain land in Mouzahr Kohara, Tahsil and Zilla Ludhiana. The plaintiffs were sons of Mohru, who had left the village and lived with his father-in-law, and on his father-in-law's death succeeded to his property as *Khana damad* or resident son-in-law. The land in dispute was the estate of Duma, deceased, brother of Mohru, and the claim was resisted by defendants (relations of the deceased), on the ground that Mohru had succeeded to his father-in-law's estate, and thereby lost all right of inheritance in his natural family.

The court of first instance over-ruled the plea and decreed the plaintiffs' claim.

The Commissioner on appeal remanded the case to the first court, under Section 354, Act VIII of 1859, for enquiry as to the existence of an alleged custom which would operate to exclude a "*khana damad*" who had succeeded to the property of his father-in-law, from claiming a share in the ancestral property of his natural family. The return made by the first court showed that no evidence of the existence of such a custom was obtainable. The Commissioner however reversed the decree in plaintiffs' favor, mainly on the following grounds,—

1. That although defendants had been unable to bring forward real cases to prove the custom, the plaintiffs had also been unable to prove that "*khana damads*" had ever inherited their own father's land.

2. That in the Commissioner's experience, where a claim for inheritance as *khana damad* has ever been asserted and disputed, the fact of relinquishment of all right to succeed to ancestral property has been always asserted or denied.

Plaintiffs accordingly appealed to the Chief Court. The judgment of the Court was delivered by,

25th April 1878.

ELSMIE, J.—We are of opinion that in the absence of satisfactory proof of the alleged custom, the plaintiffs in this case should not be debarred from inheriting the share of land to which they are *prima facie* entitled. It has been argued in this court for the defendants, that the son-in-law Mohru having virtually abandoned all rights in his natural family, his descendants are bound by such abandonment. It is sufficient to say that no such distinct and conclusive abandonment has been proved, and that even if such a plea had been established, it would be open to argument whether it could be held sufficient to bind descendants claiming rights as collateral heirs.

The appeal is accepted, the order of the Commissioner reversed, and that of the first court restored with costs throughout.

No. 69.

MUSSAMMAT RABIA,—(Defdt.)—APPELLANT,

Versus

MAHOMED BAKSH, & OTHERS—(Platffs.),—RESPONDENTS.

} APPELLATE SIDE.

Case No. 1,512 of 1877.

(SMYTH AND ELSMIE, JJ.)

Mahomedan Law—Custom—Weavers of Jalandhar—Daughters—Succession of—Brothers' sons and grandsons—Ancestral house property.— Found that, by the custom among weavers of Jalandhar, in the presence of daughters, brothers' sons and grandsons are not entitled to succeed to ancestral house property.

Regular appeal from order of Commissioner Jalandhar Division, dated 17th August 1877.

Suraj Bal, Pundit, for appellant.

Protul Chandar Chatterji for respondents.

The parties in this case are weavers of Jalandhar, and the property in dispute consists of a Haveli situated in that town. It was found by both the lower Courts that the Haveli was ancestral property and that it fell in a division of that property to Soudagar, one of the sons of Khaiya:—Soudagar died recently, leaving a daughter Mussammat Rabia by his wife Mussammat Sahibo. His second wife, Mussammat Aishan, died in his life time, but by her he had no children. She had previously been married to his brother Hashim, and by him had a son Kasu, who died leaving a daughter Jima. Jima married Mahomed Baksh, son of Soudagar's brother Khalil, and one of the plaintiffs in this case.

The other plaintiffs are the two grandsons of another brother of Soudagar's, Khuda Baksh. Soudagar, in 1871, executed a will, whereby he gave the Haveli in dispute, in equal shares, to Mussammat Rabia, his daughter, and to Mussammat Jima, the grand-daughter, as above stated, of his brother Hashim and of Mussammat Aishan, the second wife of Soudagar.

The plaintiffs brought this suit against Jima and Rabia to obtain possession of the Haveli left by Soudagar, alleging that in presence of brother's sons and grandsons in the male line daughters and descendents of brothers in the female line are not entitled to succeed, and that the will was invalid.

Neither party relied on the Mahomedan law. Both alleged that succession in their class was governed by custom, and the main question for decision was whether according to the custom

brothers' sons and grandsons in the male line, excluded a daughter of the deceased and a grand-daughter of a brother of the deceased.

The first court found that the custom was in favor of the daughter's succession. In appeal the Commissioner held otherwise, remarking "I have carefully heard all the evidence and papers in the case and consider the proof most conclusive that the brothers' sons inherit and not the daughters'."

He accordingly gave plaintiffs a decree for possession.

Both Mussammat Rabia and Mussammat Jima appealed to the Chief Court, their appeals being brought separately.

The judgment of the Chief Court was delivered by,

16th May 1878.

SMYTH, J.—We have heard the arguments of counsel on both sides, and have perused the evidence, and we come to a conclusion thereon, different from that of the Commissioner. We consider that the weight of evidence is decisively to show that among the class to which the parties belong, a daughter succeeds to house property left by her father, in preference to her father's nephews and grand-nephews in the male line. A precedent has been produced by the defendants in which, so far back as 6th December 1867, the very point now in dispute was decided by Pundit Moti Lal, Extra Assistant Commissioner of Jalandhar, who held that by custom among weavers of Jalandhar, nephews were excluded from succeeding in presence of daughters. A prior decision of the Deputy Commissioner of Jalandhar to the same effect under date 5th July 1861, which was in accordance with the award of arbitrators and related to property in the town of Jalandhar, has been produced by the defendants, but it is not clear whether the parties in that case were weavers or not, though alleged to be so by the defendants before us, and it is therefore not of so much weight as the one above cited. In "Notes on Customary Law," decisions are cited either way, but we observe that in one from the city of Jalandhar, the custom was found in favor of the daughters. Looking at the oral evidence which has been produced in the present case, on the question of custom, we consider that it preponderates in favor of the defendants.

We find that in presence of daughters, brothers' sons or grandsons are not entitled among weavers of Jalandhar to succeed to ancestral house property, and as plaintiffs therefore have failed to prove their title, we accept this appeal, and dismiss their suit with costs throughout.

No. 70.

BUTA AND GULAM MUHAMMAD,—(Plaintiffs),—
RESPONDENTS,

Versus

NUR MUHAMMAD AND SHAMSHUDDIN,—(Defendants)—
APPELLANTS.

} APPELLATE SIDE.

Case No. 342 of 1878.

(FLOWDEN AND SMYTH, JJ.)

Custom—Muhammadans—Adoption—Child brought up from infancy—Gift to—Appointment of heir—Inheritance—Hoshiarpur District.—N. M. was brought up from his infancy by K. B., lived with him and was married by him. In 1872 K. B. executed a deed of adoption in which he declared that he regarded N. M. as his own begotten son and intended that he should inherit all his property. In 1873 K. B. caused mutation of names to be effected. It did not appear that N. M. was put in possession, but on the other hand there was no evidence that between 1873 and his death K. B. revoked his declaration that N. M. was his adopted son and was to be his heir.—*Held* that, under the circumstances, N. M. was entitled by custom to inherit the property of K. B.

Regular appeal from order of Commissioner, Jalandhar Division, dated 23rd November 1877.

Kali Prosono Roy for Appellants.

This was a claim to a share of the estate of Karm Baksh a deceased Muhammadan, consisting of a house and 10 bigahs, 5 biswas of land situate in Mouzah Tanda, Tahsil Dasuah in the District of Hoshiarpur.

The facts of the case are sufficiently stated in the judgment of the Chief Court which was delivered by

FLOWDEN, J.—We have heard counsel for the appellants at length, but we are not convinced that there is any error in the judgment of the Commissioner. 17th June 1878.

It is found in the defendant's, Nur Muhammad's, favor that he was brought up from his infancy by Karm Baksh, that he lived with him, his marriage was effected by him, and his wife lived in Karm Baksh's house during Nur Muhammad's absence.

It is also found that in 1872 Karm Baksh executed what is termed a deed of adoption in which there is a most unequivocal declaration that Karm Baksh regarded Nur Muhammad as his own begotten son and intended that he should inherit all his property. In 1873 Karm Baksh caused *Dakhil Kharij* to be made of all the land in suit in Nur Muhammad's name, although it does not appear that he was put in possession of the land or of the house property in any other way. There is no evidence that, at any time between 1873 and his death, Karm Baksh revoked his solemn declaration that Nur Muhammad was his adopted son and was to be his heir, or had changed his intentions.

We think that upon this evidence it cannot be doubted that Karm Baksh did all that he probably could to constitute his heir, with the sole exception of making in his life time a complete gift, that is gift followed by actual possession of his property to Nur Muhammad.

It is contended before us that among Muhammadans an adoption of this kind (as it is sometimes termed, though the term is inaccurate and misleading) is not valid as giving the person adopted a title to inherit, unless there be possession given during the adoptor's life-time.

This is virtually the same thing as to argue that there is among Muhammadans no such thing as adoption, as a legal rite having legal consequences, for upon the argument advanced, the person adopted takes whatever he takes by virtue of the completed gift at once and not as heir, on the adoptor's death.

We do not think this contention is well founded, and the case, No. 54 of *Punjab Record* 1874, is a distinct authority for the position that actual transfer of possession of the adoptor's property during his life time is not essential, in order to constitute a person appointed as heir competent to inherit. That was also a case among Muhammadans and the prevalence of the custom among Muhammadans was in that case judicially affirmed.

We therefore uphold the Commissioner's judgment as regards Nur Muhammad, and, as the case is not pressed against Shamsuddin, we dismiss the appeal as against him also.

The appellants will pay the costs of Nur Muhammad alone in this Court.

No. 71.

APPELLATE SIDE.

MUSSAMAT DHAMMI, GUARDIAN OF HER 3 SONS
 BINDU, KANDU AND CHANDU,—(Plffs.),—APPELLANTS,
Versus
 MEHTAB KHAN AND MUSSAMAT MURAD BIBI,—(Defdts.)
 —RESPONDENTS.

Case No. 319 of 1878.

Muhammadan Law—Acknowledgment of son—Legitimation—Legal obstacle to marriage.—D. an undivorced woman left her husband K, who was still living, and went and lived continuously with one J. by whom she had three children.

Held, assuming there was a marriage between J. and D., that D. being undivorced, the marriage could not legally have taken place, and that therefore, the offspring of the connection, even if the paternity was acknowledged by J., was incapable of being legitimated according to Muhammadan Law.

Civil Judgment No. 13, *Punjab Record* 1875, distinguished.

Regular appeal from order of Additional Commissioner, Jullundur, dated 15th December 1877.

Sheik Nanak Baksh for Respondents.

The facts of this case are sufficiently stated in the judgment of the Chief Court which was delivered by

FLOWDEN, J.—The only point in this case is as to the legitimacy of the children begotten by Jani from Mussammat Dhammi. She is of the Jhiwar caste and a Muhammadan, and was married to one Kalya. Some 22 or 23 years ago, she left her husband and lived continuously with Jani by whom she has had children, plaintiffs in this suit. Jani was a Mussulman Rajput and recently died. It is not proved that Kalya ever divorced Mussammat Dhammi: he is still living and denies having divorced her. 21st June 1878.

The question is whether the children of Jani by Mussammat Dhammi are legitimate children entitled by law to inherit Jani's property.

We are of opinion that they are not; that the marriage of Jani to Mussammat Dhammi, during the life-time of the latter's husband, she being undivorced, could not legally have taken place, and that therefore the offspring of the connection between the two, even if the paternity was acknowledged by the father Jani, was incapable of being legitimated (see *Shama Charn Sircar's Digest, Muhammadan Law*, pp. 121, 126, 328 and 374 and *Baillie's Digest* pp. 411, 412.

The present case differs in its circumstances from that reported in No. 13, *Punjab Record* 1875, which the first court followed. In that case there was no legal obstacle to the marriage of the person alleged to be the father of the children, whose legitimacy was then in question, with the woman who was their mother.

The appeal is dismissed with costs.

No. 72.

SIRDAR DIWAN SING, SIRDAR GANDA SING, AND

KAHN SING,—(Defendants),—APPELLANTS,

Versus

MUSSUMAT SUBHAN GUARDIAN OF BURA MINOR—

(Plaintiff),—RESPONDENT.

} APPELLATE SIDE.

Case No. 1,013 of 1878.

(ELSMIE, J.)

Custom—Adoption—Daughter's son—Khatris—Kakri got—Firozpur District—Found that, by the custom of khatris of the kakri got, in Mouzah Salibrah, Tahsil Mogah, Zillah Firozpur, the adoption of a daughter's son is valid.

Adoption of a brother's daughter's son accordingly upheld.

Special appeal from order of Commissioner, Lahore Division, dated 8th April 1878.

This was a suit for a declaration that Bura was the adopted son of one Dulla, a tenant with rights of occupancy in certain land situate in Mouzah Salibvah, tahsil Mogah, in the Ferozpur district.

The facts of the case are sufficiently stated in following remand order of the

21st Feby. 1878. *Commissioner.*—Dulla is an hereditary cultivator and has adopted Bura, the only son of Mussamat Atma Devi. Atma Devi being his niece (brother's daughter). Atma Devi's husband is dead 12 or 13 years since.

The adoption would of course carry succession to the occupancy rights with it and a decree has been passed accordingly. It is opposed by appellants, the landlords. A deed of gift is also filed, and would not, I think, be a valid alienation as against the landlord. But the adoption would carry a valid title with it on Dulla's decease.

The respondents are khattris of the Kakri gôt.

They have of course a right to adopt, but it is argued that the adoption of Bura is contrary to both Dhurmshastra and custom.

The boy is said to inherit from his father.

These points must be further enquired into. Can a daughter's son be adopted amongst the khatri caste, especially if his father be dead.

Can a boy who inherits from his father be adopted by a man of this caste? If not; does this boy inherit from his father? All that the local enquiry at present shows is that custom allows adoption, and that this has been done in five or six cases in this village. But it does not deal with the special circumstances attending the adoption in this instance.

The case is remanded for a finding on the above points after enquiry from trustworthy members of the caste. To be returned on April 5th.

8th April 1878. On receipt of a return to the above order of remand the Commissioner gave judgment as follows :

“ The evidence is strongly in favor of the respondent.

“ Instances are quoted of similar adoptions and the only evidence offered against it is that of men who are not khattris, a Tarkan and Jat.

“ Mr. Gouldsbury for the appellant now argues that the parties are bound by strict Hindu Law ; that the ceremonies, giving and taking, were not sufficient to constitute a legal adoption, that it was effected in order to prevent the lapse of the occupancy rights, and that the evidence of custom is insufficient.

“ The evidence is quite sufficient to establish both the adoption and the right to adopt.

“ The objections first raised by the appellant have now been answered. The Extra Assistant Commissioner himself is a com-

petent judge of the point and of the credibility to be attached to the witnesses who prove it.

“ The appeal is dismissed with costs.”

From this order the defendants appealed to the Chief Court.

The Commissioner's order was confirmed and the appeal rejected at a preliminary hearing by the following order of

ELSMIE, J.—I think the Commissioner was right and that sufficient evidence of a valid adoption was given as against the landlords who are not relatives of the hereditary cultivators. 10th July 1878.

Rejected.

No. 73.

MATHRA DASS,—(Plaintiff),—

Versus

RAMANAND,—(Defendant).

} REFERENCE SIDE.

Case No. 7 of 1878.

(SMYTH AND ELSMIE, JJ.)

Stolen currency note.—Bonâ fide holder.—“ Goods.”—*Contract Act IX of 1872.—Sections 76 and 108.*—R. L., of Rohtak was robbed of a currency note by one N., who brought it to Dehli and with the assistance of H., got it cashed by R. N., who passed it for full consideration to M. D.

The Rohtak police traced the note to M. D., seized half of it and gave it in as evidence in the Criminal case against the thief N.; the latter was convicted and by order of the Magistrate the half note was handed over to R. L., who subsequently sued before the Judicial Assistant of Rohtak and obtained a decree (ex parte) against M. D., for the other half note, or (alternatively) for Rs. 100.

In a suit by M. D., against R. N., from whom he received the note, to recover its value, held that M. D. was not entitled to recover, he having received full consideration from R. N.

The title of the *bonâ fide* holder, for consideration, of a currency note, is not defective by reason of a defect in the title of a previous holder.

Held further, that the fact of M. D. having been deprived of his note by a decree of the Judicial Assistant of Rohtak did not give him a cause of action against R. N., from whom he obtained it.

Case referred by Judge, Small Cause Court, Dehli, under Section 617, Civil Procedure Code.

Stated case.—The history of this case is as follows :—

Radha Lal of Rohtak was the holder of a currency note of the Government of India No. ^{P.}₁₅ 05999 dated 16th January 1875. In September 1877, that note was stolen from him by one Nathoa, who brought it to Dehli, and through the assistance of one Hurdeo Mistri he got it cashed by Ramanand of Dehli, who passed it for full consideration to Mathra Dass.

The Rohtak Police traced the note to Mathra Dass, seized half of it and gave it in as evidence in the Criminal case against

Nathoa; the latter was convicted, and by order of the Magistrate the half note was handed over to the Prosecutor *Radha Lal* who subsequently sued before the Judicial Assistant of Rohtak and obtained a decree (ex parte) against *Mathra Dass* for the other half note or (alternatively) for Rs. 100, and costs, &c.

Mathra Dass sued the Police Inspector Shibdyal (who seized the note) in this court at case No. 373, decided on the 29th March 1878, but failed as the Police Inspector was held not to be liable. *Mathra Dass* now sues *Ramanand* from whom he obtained the note.

Now it would seem that *Mathra Dass* had a good title to the currency note, as there is no question that he is a *bona fide* holder for good consideration, and is not the purchaser from the thief. Even the latter (purchaser) would seem to have a good title if he was not aware of the fact of the theft and took the note in payment or for consideration.

Plaintiff's pleader admits that he had a good title, but says that having been wrongly deprived of it by the Magistrate and by the Civil Court of Rohtak he has an action against the person from whom he got it.

The defendant pleads non-liability to plaintiff; the question as to whether he (defendant) is liable to *Radha Lal* or not is not raised, but he argues that he gave plaintiff *Mathra Dass* a good note with a good title for the money paid to him (defendant) by plaintiff, and that therefore plaintiff cannot have any claim against him.

The plaintiff states that the view taken by the Rohtak Courts is based on section 108 of the Contract Act, which prescribes that "no seller can give to the buyer a better title than he has himself" and hence that no holder of the note subsequent to the theft has a title. It is true that this is the general rule in regard to movables since Act IX of 1872 became law, but that Act does not refer to the case of currency notes and money generally, and was evidently never intended to alter the law relating to them; notes are legal tender and are payable to bearer, and to hold that every person taking a note is bound to satisfy himself that there has been no break in the continuity of the title in it from the date of issue to the time of his taking it, would be monstrous and would entirely stop their circulation. If plaintiff's title in the note was defective by reason of *Nathoa's* theft, then a holder of a stolen note ten years after the theft, would have no title, though it may have passed for full consideration through the hands of a hundred persons.

The English law on the subject is briefly put in Addition on Contracts, 6th edition, page 950, which is as follows:—

"Of payment. Payment by a stolen Bank note. A Bank note "payable to bearer and transferrable by delivery is considered as "money, so that every person who takes it by way of payment of "a debt in the ordinary course of business has a good title to it; and "his right to enforce payment of it is unaffected by any infirmity "of title in the person who delivered it to him. If therefore a

“tradesman gives chauce for a stolen note in ignorance that the
 “note has been stolen and then pays the note to a creditor in dis-
 “charge of a debt the payment is a good payment, the creditor
 “having a valid title to the note, and being able to enforce the
 “security against the Banker who issued it.”

This being so it seems to me that plaintiff got a good title from Ramanand, and therefore got full consideration from Ramanand for the money paid to the latter for the note.

The mere fact of plaintiff's having (in my opinion) been wrongly deprived of his note by the Rohtak Courts gives rise to no cause of action against Ramanand.

I would solicit a ruling of the learned judges of the Chief Court upon the following points, viz. :

(1.) Is the title of the *bond fide* holder, for consideration, of a currency note of the Government of India, defective by reason of a defect in the title of a previous holder.

(2.) If not, then the plaintiff having been deprived of his note by a decree of the Rohtak Court does that give him a cause of action against the person from whom he obtained the note.

I hold the view that the holder for consideration has a valid title and that the plaintiff's only course is to apply to the Rohtak Court to set the matter right; unless the plaintiff's title be held to be defective, he would seem to have no cause of action against Ramanand defendant.

The suit has been dismissed subject to the decision on this reference.

ELSMIE, J.—I am of opinion that the view taken by the Judge Small Cause Court, Dehli, on the points referred is correct.

The Chief Court has held on the Criminal Revision side, *Crown versus Gokul*, Nos. 83 and 95 of 1878, that a stolen note when it passes into the hands of an innocent holder for value ceases to be stolen property, see last clause section 410, Indian Penal Code.

Section 108 of the Contract Act is, in my opinion, inapplicable to the case of coin or Bank notes passed in the course of business. A currency note may be given in payment of goods or in exchange for metal coin, but it cannot be said to be bought by the person selling the goods or supplying metal coin in exchange.

The inconvenience would be intolerable if the innocent holder of marked money should be held liable to give it up on proof by a previous possessor that it had been stolen from him at some former time.

This view is I find supported by the case quoted at page 368, Prinsep's Procedure Code, 5th edition, under section 420, Criminal Procedure Code, and by a decision of the High Court Calcutta in the matter of Captain Michell, page 339 Calcutta Law Report, Volume I.

SMYTH, J.—I concur.

No. 74.

APPELLATE SIDE.

MAHAMADJU & 2 OTHERS,—(Defendants),—APPELLANTS,
Versus

JAI RAM,—(Plaintiff),—RESPONDENT.

Case No. 209 of 1878.

(SMYTH AND ELSMIE, JJ.)

Bond—Mortgage—General hypothecation of moveable and immoveable property.—A bond which does not specify the property alleged to be hypothecated, but merely engages that the debt may be realized from the moveable and immoveable property of the debtor, *held* not to operate as a mortgage.

Special appeal from order of Additional Commissioner, Amritsar, dated 15th January 1878.

Kali Prosono Roy for Appellants.

The judgment of the Chief Court was delivered by—

20th July 1878.

ELSMIE, J.—We are of opinion that the bond which does not specify the property alleged to be hypothecated, but merely engages that the debt may be realized from the moveable and immoveable property of the debtor, would not operate as a mortgage.

The appeal is undefended, and the counsel for the appellants informs us that plaintiff has realized the full amount of his decree against Muhamadju without resorting to the sale of the property now in litigation.

We accept the appeal with reference to our opinion above expressed in regard to the effect of the bond and dismiss plaintiff's claim with costs.

No. 75.

REFERENCE SIDE.

GANGA RAM,—PLAINTIFF,

Versus

SAIN DASS,—DEFENDANT.

Case No. 10 of 1878.

(PLOWDEN AND ELSMIE, JJ.)

Civil Procedure Code (Act X of 1877) Section 17 explanation 1—Temporary dwelling place—Cause of action—Jurisdiction—Small Cause Court.—S. D. was sued at Amritsar, where he temporarily resided, in respect of a cause of action which arose at Ajnala. *Held* that the Small Cause Court at Amritsar had no jurisdiction to entertain the suit.

A temporary lodging only gives jurisdiction in respect of a cause of action arising at the place where the defendant has such a lodging.

Case referred by Judge, Small Cause Court, Amritsar, under Section 617, Act X of 1877.

Stated case—The defendant lives in the Pasrur Pergunnah of the Sialkot District. He has lately come here to prosecute a case, and lodges in the city within the local limits of the jurisdiction of this court.

The cause of action arose in the Ajnala Pergunnah of this District. Plaintiff presented his plaint to the district court, but it has been returned for presentation to this court, because defendant lodges in the city, apparently with reference to explanation I, section 17, Act X of 1877, which prescribes that,—“where a person has a permanent dwelling at one place and also a lodging at another place for a temporary purpose only, he shall be deemed to reside at both places in respect of any cause of action arising at the place where he has such temporary lodging.” But I am unable to see that this is applicable to the case. It would have been, if the cause of action had arisen also in the city. But then, in that case, the suit would have been maintainable in this court, let the defendant be where he might, since section 17, of Act X of 1877 has superseded section 8 of the Small Cause Court Act XI of 1865, and it is now no longer a *sine qua non* that the defendant should dwell within the local limits of the Small Cause Court jurisdiction, if the cause of action have arisen within those limits. I am of opinion that the words “temporary lodging” in the explanation cannot be separated from the cause of action, and as in the present case there is only a *very* temporary lodging, but no cause of action within the local limits of the jurisdiction of this court, I do not think the suit lies here.

I beg to submit the question for the decision of the Chief Court.

The judgment of the Chief Court was delivered by

ELSMIE, J.—We are of opinion that the view taken by the *8th August 1878*. Judge of the Small Cause Court is correct.

No. 76.

MAHMUD KHAN,—(Plaintiff),—APPELLANT,

Versus

BHAI BALKISHEN,—(Defendant),—RESPONDENT.

} APPELLATE SIDE.

Case No. 1784 of 1874.

(SMYTH AND ELSMIE, JJ.)

Mortgage—Redemption of, in part—Suit by one sharer.—Held that a suit will not lie to redeem a share of property mortgaged.

Special appeal from order of Commissioner, Derajat Division, dated 13th September 1877.

Kali Prosono Roy for appellant.

Protul Chaudar Chatterji for respondent.

The facts of this case are fully stated in the judgment of the Commissioner which was as follows :—

“ This case coming on for hearing must be heard *ex parte* in absence of the respondent, who fails to appear on summons. The contention in this case concerns certain lands in Kotla Ahmad Khan said to have been mortgaged many years ago, no exact time has as yet been ascertained, by one Baloch Khan, who is alleged to have been grandfather of the plaintiff, appellant, to the ancestor of the defendant, respondent.

“ The plaintiff constituting himself as the inheritor of a $\frac{1}{4}$ th share of Baloch Khan's property (of this no proof has been given) sued for redemption of $\frac{1}{4}$ th of the land said to be mortgaged as above. These lands are stated to consist of half of Modenwala well, and the whole of Bendawali well. The Lower Court finds that plaintiff's claim is barred by limitation, because the result of the investigation in the case points to these lands having come down in possession of defendant and his ancestors for a period exceeding 60 years. The evidence produced by plaintiff in support of his claim is of the most unsatisfactory nature, and it would not be possible in this Court's opinion to entertain it to any extent on the grounds set forth. The reference to records of the summary and regular settlements is not convincing in itself, the entries being discrepant and challenged by the defendant, who states that the entries were made without any communication with or authority from him. Plaintiff's explanation of the discrepancy between the entries in the summary settlement papers and that in those of the last and regular settlement is improbable and unsubstantiated. Defendant professes that the mortgage deed has disappeared and claims retention on the ground of long and even ancient right. In a country where the mortgage deed is usually retained by the mortgagee it would seem that the *onus* of proving the period of an admitted mortgage lay on the defendant or holder of the deed, but the conduct

“ of the plaintiff and his co-heirs in the property appears to have
 “ been unaccountably lax and careless throughout, for none of them
 “ would appear to have taken any precaution to secure whatever
 “ rights may have remained to them from the commencement of
 “ British administration to the present time. The plaintiff being
 “ but a part-sharer, as admitted by himself, in the inheritance left by
 “ Baloch Khan, the mortgagor, and there being nothing before the
 “ Court to certify the interest of other descendants and probable
 “ claimants of shares, this Court holds that plaintiff cannot of himself
 “ sue for redemption of part of the lands alleged to be mortgaged to
 “ Balkishen, and that, on that ground alone, his separate claim must
 “ be rejected. The appeal is dismissed with costs, but this order will
 “ be no bar to the heirs in common of Baloch Khan suing for re-
 “ demption of the whole of this mortgage, should they be disposed
 “ or combine to do so. Their neglect to clear up the matter in
 “ dispute during the course of the Regular Settlement is unac-
 “ counted for.”

The judgment of the Chief Court was delivered by

13th March 1878.

ELSMIE, J.—We think the Commissioner was right in hold-
 ing that the plaintiff's suit to redeem a share of the property under
 mortgage should not be heard, and the correctness of this deci-
 sion is not seriously contested by the counsel for the plaintiff,
 appellant. It is clear that the Commissioner did not affirm the
 finding of the first Court on the question of limitation, and
 we see no objection under the circumstances to expressing the
 opinion that a suit to redeem the whole mortgage could not be
 regarded as *res judicata* by reason of the decisions of the Lower
 Courts in the present case.

The appeal is dismissed with costs.

No. 77.

UTTAM CHAND, ASA NAND, BEHARI, GANESH,—
 (Plaintiffs),—APPELLANTS,

APPELLATE SIDE. {

Versus

BYSAKHI,—(Defendant),—RESPONDENT.

Case No. 1607 of 1877.

(SMYTH AND ELSMIE, JJ.)

*Adoption—Sister's grandson—Aroras of Lahore—Custom—*By the
 custom of the Aroras of Lahore, the adoption of a sister's grandson is
 valid.

Regular appeal from order of Commissioner, Lahore Division,
dated 11th October 1877.

Spitta for appellants.

Kali Prosono Roy for respondent.

Plaintiff, Uttam Chand, nephew of one Dittu Mal, deceased, sued for a fourth share in a house in Lahore, the property of Dittu Mal.

The defendant, Bysakhi, pleaded that he was the adopted son of the deceased Dittu Mal, who acquired the house in suit, of which he, defendant, was in sole possession.

The issue drawn by the Court of first instance (Baron Bentinck, Assistant Commissioner,) was, whether Bysakhi was adopted by Dittu Mal, and whether such adoption was valid according to custom.

The Court found against the factum of the adoption, as also against the validity of an adoption of a sister's grandson (which Bysakhi was) amongst Hindus of the Arora tribe, and found further, that amongst Aroras certain ceremonies must take place to render an adoption valid, which ceremonies were never performed in Bysakhi's case. The Court therefore decreed the whole of Dittu Mal's property to plaintiff and his three brothers who had subsequently been joined as co-plaintiffs.

The Commissioner, Colonel Hall, on defendant's appeal, reversed the finding of the first Court as to the factum of the adoption, and, on the question of its validity, gave judgment as follows :—

“As regards the validity of the adoption, it is only necessary “to quote the Chief Court Rulings in No. 50 *Punjab Record* 1874, “No. 83 *Punjab Record* 1867 and Civil Appeal No. 497 of 1868.

“The adoption of a sister's grandson, which defendant is, was “therefore valid, although the Lower Court accepted a vague assertion made, that a sister's grandson could not be adopted amongst “Aroras. The fact of the adoption in this case is actually more “clear than in many others where it has been judicially affirmed, “and the rulings above quoted, together with the exposition of the “Customary Law, as detailed in Boulnois and Rattigan's notes pp. “80 and 81, settle the point as to the adoption of a sister's grandson being valid.”

The Commissioner accordingly reversed the order of the first Court and dismissed the suit.

Thereupon plaintiffs appealed to the Chief Court. The judgment of the Court was delivered by

SMYTH, J.—We consider it clear (and the point was not pressed by Mr. Spitta) that among the class to which Dittu Mal belonged, custom allows a sister's grandson to be adopted. 20th March 1878.

As to the factum of the adoption, we consider, upon a perusal of the evidence and after hearing the arguments of counsel, that there is no reasonable doubt that the adoption took place. It is shown that Dittu Mal took Bysakhi from his father when he was a child of six years' age and brought him up as his son. He performed ceremonies for Bysakhi which are usually only performed by a child's father, for instance, the investiture of Bysakhi with the *jonau* and the marriage of Bysakhi. There is evidence also to show that Bysakhi was regarded by the neigh-

bours as Dittu's adopted son. Moreover, on Dittu's death, when application was made by Bysakhi for a certificate under Act XXVII of 1860, Dittu's widow admitted that Bysakhi was Dittu's adopted son. She is now dead, but her statement then made, which was one against her proprietary interest, is admissible in evidence in the present case under Section 32 of the Evidence Act.

Having regard to all this, we consider that, though the evidence as to the actual ceremony which took place on the occasion of the adoption is weak, a strong case is established by the defendant in support of his adoption, and it is not in our opinion rebutted by the evidence which has been produced on the other side.

We hold that the factum of the adoption is proved, and we accordingly dismiss this appeal with costs.

No. 78.

APPELLATE SIDE.

KHAIR MUHAMMAD AND RUKUNDIN,—(Defendants),—
APPELLANTS,

Versus

AHMUDIN, FAZALDIN AND ALLADIN,—(Plaintiffs),—
RESPONDENTS.

Case No. 970 of 1877.

(SMYTH AND ELSMIE, JJ.)

Limitation—Act IX of 1871, Schedule II No. 148—Acknowledgment of mortgage—Admission in deposition signed by mortgagee—Elder brother acting on behalf of younger brother.—In a deposition in writing recorded in 1857 in a previous suit, and signed by the mortgagee K. M., he admitted the title of his mortgagor. To that suit R. co-mortgagee, was no party, but it was found that, in accordance with the practice in those days, K. M. as head of the family was acting for R. his younger brother. In a suit instituted in 1877, for redemption of mortgage, held that the admission in the deposition of 1857 signed by K. M. was a sufficient acknowledgment of the title of the mortgagor within the meaning of Article 148, Schedule II of the Limitation Act 1871, and that, as the admission of 1857 was made by K. M. on his own behalf, and as agent of his brother R., the claim was within limitation.

Special appeal from order of Commissioner, Rawalpindi Division, dated 9th April 1877.

Cullin for appellants.

Bates for respondents.

The facts are sufficiently stated in the judgment of the Chief Court which was delivered by

3rd April 1878.

ELSMIE, J.—We are of opinion, after hearing counsel, that whether or not the decree of 1857 sufficed to bring the claim

within limitation, and on this point we express no opinion, the deposition in writing signed by the mortgagee Khair Muhammad dated 22nd April 1877 filed with the former suit is a sufficient acknowledgment of the title of the mortgagor within the meaning of the explanation in the 3rd Column of Schedule 2, Article 148, Act IX of 1871.

The effect of this admission so far as Khair Muhammad is concerned, is not denied by the defendant's counsel, but it is contended that this admission would not bind the co-defendant Rukandin. We observe that Rukandin is the younger brother of Khair Muhammad, and it is a matter of notoriety that in the earlier settlements, suits of the present description were instituted or defended by the heads of families without their having in all instances obtained formal powers of attorney from the co-sharers. We also observe that the defendant did not say in either of the lower Courts that Rukandin was not a party to the former suit, on the contrary the whole tone of their joint written statement dated the 10th February 1877, leads to the conclusion that it never occurred to them to plead that Khair Muhammad had been acting in the case of 1857, independently of Rukandin. We think therefore that there is good ground for holding that the admission of 1857 was made by Khair Muhammad on his own behalf and as agent of his brother, and that consequently it is sufficient to bring the present claim within limitation.

The plea of *res judicata* is not pressed by the counsel for defendants, regard being had to the decision of this Court in case No. 86 *Punjab Record* for 1877.

We dismiss this special appeal with costs.

No. 79.

SHER KHAN,—(Plaintiff),—APPELLANT,

Versus

PIR BUKSH,—(Defendant),—RESPONDENT.

} APPELLATE SIDE.

Case No. 376 of 1878.

(PLOWDEN AND ELSMIE, JJ.)

Punjab Tenancy Act, XXVIII of 1878, Sections 34 and 35—Occupancy rights—Mortgage of—Death of occupancy tenant without heirs—Right of mortgagee as against proprietor.—Plaintiff, proprietor, sued to recover possession of land held by defendant, mortgagee of Sharafdin, occupancy tenant, who died without heirs two years before suit was brought. *Held* that plaintiff was entitled to a decree, as the interest of the mortgagee in the land could be no greater and last no longer than that of the mortgagor (occupancy tenant) from whom it was derived, and that the mortgagor's interest having come wholly to an end by reason of his death without heirs, the mortgagee's interest ceased with it, even if the mortgage was made with the proprietor's knowledge or was afterwards assented to by him.

6701R
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Regular appeal from order of Commissioner, Jullundur Division, dated 27th November 1877.

Monlvi Ilahi Baksh for appellant.

This was a suit by the proprietor to recover possession of certain land from defendant, who held it as mortgagee from the occupancy tenant, Sharafdin, who died without heirs two years prior to the institution of the suit. The mortgage was effected seven years previous.

The Court of first instance found that plaintiff had, from time to time, received rent from defendant without objection; but on the authority of a decision of the Madras High Court held that this silence did not imply acceptance or consent, and that the proprietor was entitled to object and come in within 12 years. The first Court accordingly decreed the claim.

The Commissioner, on defendant's appeal, reversed the decree of the first Court, in the following judgment :—

"I differ from the Extra Assistant Commissioner. The late hereditary cultivator has now died without heirs, and hence the mortgagee, if now ejected, has no remedy and has lost his money. If the owners objected, they were bound to object during the mortgaging tenant's lifetime, so as to allow defendant an opportunity of recovering his money by an ordinary suit. As they failed to do this, and defendant would suffer loss by their act if they were allowed to obtain the relief now prayed for, the plaintiffs are now estopped from objecting and must submit to the results of their own acts.

"I accept the appeal and dismiss their claim with costs throughout.

"The further question whether a mortgage by a tenant whose tenure has expired has any validity has not been raised by either party, but as a sale by an hereditary tenant is held valid even after the tenant's rights have lapsed by failure of heirs, a mortgage by such a tenant must equally bind his representatives or successors, and therefore be valid against the owners, otherwise the sale would be equally bad."

From this order the plaintiff appealed to the Chief Court. The judgment of the Court was delivered by

13th June 1878.

PLOWDEN, J.—The plaintiff is the proprietor of the land in suit, the defendant is in possession as a mortgagee under one Sharfadin, who was hereditary cultivator of the land, and died without heirs some two years ago. The plaintiff sues for possession and he is in our opinion clearly entitled to it, the hereditary cultivator having died without heirs, and this is so even if the mortgage was made with the plaintiff's knowledge or was afterwards assented to by him.

The interest of the mortgagee in the land could be no greater and last no longer than that of the mortgagor from whom it is derived, and that having come wholly to an end by reason of the mortgagor's death without heirs, the interest of the mortgagee necessarily ceases also.

The case of an absolute transfer of the tenants whole interest with the landlord's assent is not analogous, because then

it may be and probably is the case that the transferee is accepted by the landlord as a new tenant with occupancy rights holding in his own right and not in the right of the transferor, that is with an interest lasting for so long as he, the transferee, shall have heirs capable of succeeding, and not so long as the transferor shall have such heirs.

We accordingly accept this appeal and restore the order of the first Court with costs throughout.

No. 80.

JEWA,—(Defendant),—APPELLANT,

Versus

KARM BAKSH,—(Plaintiff),—RESPONDENT.

} APPELLATE SIDE,

Case No. 156 of 1877.

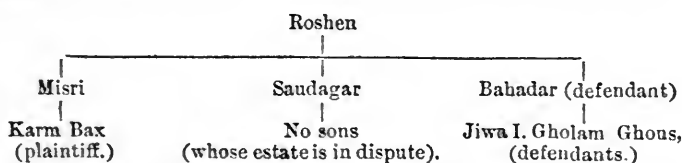
(PLOWDEN AND SMYTH, JJ.)

Custom—Muhammadian Jats of Nawashahr Tahsil—Jullundur District.—Quasi adoption—Inheritance—Adoption of sister's son. S., a Muhammadian Jat of the Nawashahr Tahsil, appointed J. his quasi adopted son to be his heir. Found, that custom recognized J's right under the circumstances to inherit the property of S.

Regular appeal from order of Additional Commissioner, Jullundur, dated 6th November 1876.

Tara Ballab Chatterji for respondent.

The following table shows the relationship of the parties to the suit :—



The plaintiff sued for half of Saudagar's estate, of which the defendant, Jiwa, had possessed himself as adopted son of Saudagar, he not being, plaintiff alleged, really adopted.

Plaintiff also said that, were the adoption proved, he would not have claimed. Defendant, Bahadar, for himself and Jiwa, a minor, said Jiwa was adopted by Saudagar 20 years ago, and that this was entered in the Patwari's *roznamcha*.

The following issue was fixed :

1. Was Jiwa adopted by Saudagar or not ?

The case was tried down to a certain point by Syad Hadi Hossein, who gave his opinion that the adoption was proved, but who adjourned the case for enquiry into the custom of the tribe.

It was then taken up by Diwan Ram Nath, who, noting that plaintiff had already admitted the validity of the custom by saying he should not have sued had Sandagar really adopted Jiwa, put aside any further enquiry into custom, and, remarking that the adoption was abundantly proved by the Putwari's *roznamcha* supported by the oral evidence, dismissed plaintiff's case.

From this order the plaintiff appealed to the Additional Commissioner, who remanded the case by the following order :—

27th April 1876.

“ The principle upon which this case has been determined is, that plaintiff started with an admission, in effect that if the lad Jiwa had really been adopted by Sandagar, he should not have claimed his share in Sandagar's estate, and that now that the Court has found that the adoption actually took place, plaintiff cannot be allowed to shift his ground and plead that adoption confers no rights, and that gifts are not permissible except within certain limits, &c., &c., and that adoption is opposed to the custom of the tribe.

“ Thus, the first question I have to decide is whether these or similar objections are now barred. Looking to the fact that this admission of plaintiff's, that he would not have sued if adoption had really taken place is recorded in the hand of Syad Hadi Hossein but that yet that officer permitted plaintiff to urge that adoption was opposed to custom, and set about investigating the custom of the tribe, I think it may be fairly argued that Hadi Hossien did not think it right to take advantage of the statement which was probably made unguardedly, but considered that plaintiff should have an opportunity of making the most he could of his case by proving, if such were possible, that no such adoptions are permissible in the tribe—or at any rate that it confers no legal consequences, and I think it was a pity that Diwan Ram Nath did not complete the enquiry set on foot by his predecessor, and that this should certainly now be done.”

The law of the case appears to stand thus :—

“ The parties are Muhammadans, and, by law, adoption confers no legal consequences, and the son adopted can only get what the father confers. In this case the father undoubtedly intended to confer the whole of his estate on Jiwa. If this was a *death bed gift* however he could not really gift him with more than $\frac{1}{3}$ rd, without the consent of the other heirs. But all these legal difficulties in the way of Jiwa's succession to Sandagar's estate may be removed if a well defined custom can be proved to exist amongst the Muhammadan Jats of the district under which adoptions are recognised amongst them as conferring on the adopted sons the rights to inherit to the exclusion of all collaterals.

“ The case is returned under Section 354 that these issues may be tried :

“ ‘ 1. Whether amongst the Muhammadan Jats of the district the adoption of a son carries with it a title to succeed AS A SON, or whether the ordinary rule of law prevails. *The onus of proving the existence of the custom will rest on defendant.*’

“ ‘ 2. If no custom is proved, then was this gift to his adopted son made at a time when Sandagar was in apprehension of death

“or while in full possession of his faculties and not under contemplation of speedy death.’

“I think the 1st issue should, with the Deputy Commissioner’s permission, be entrusted either to the Tahsildars or to the Munsiffs in each of the 4 tahsils in this district, and the case should be returned to this Court within 2 months, the Lower Court fixing a date for the parties’ attendance here.”

Upon receipt of return to the above order of remand, the 6th Novr. 1876. Additional Commissioner gave judgment as follows:—

“The Court reports on the issues sent down, that in paraganahs Phillour and Nakodar the custom is in accordance with Muhammadan law, i. e. that adoption carries with it no special rights. In tahsil Jullundur both customs are said to prevail, viz., that of recognising an adopted son as the heir, and not so recognising him. In tahsil Nawashahr, where the parties reside, the custom is to recognise an adopted son as his adoptive father’s heir.

“On the 2nd issue, the Court finds that, as a fact, people do not make wills unless they expect shortly to die, but that though the gift was a testamentary one there are no grounds whatever for supposing that the Patwari recorded anything but what was the express wish and intention of the deceased. Finally, the Court points out, the plaintiff deliberately declared that, if the adoption was proved, he should have no claim, and this also shows that he considered that Muhammadan law did not apply to the case but rather that the matter was governed by Hindu custom.

“On examining the report of the Tahsildars regarding the custom, I find that the theory, that there is a custom, which confers on one adopted son the full rights of heirship, rests on very slender grounds, and I hesitate to accept them as establishing a custom opposed to a well known rule of law.

“I hold that the deceased on his death bed was not competent to give away, to the prejudice of other heirs, more than one-third of his estate, and that this one-third is all that under that deed can be held to have passed legally to Jiwa his adopted son.

“The appeal is accepted and $\frac{1}{3}$ rd of the estate of the deceased Saudagar is decreed to Karm Baksh with proportionate costs in all Courts. This order of course is not intended to prejudice the life interest of the widow.”

From this order the defendants appealed to the Chief Court.

The case was remanded for further enquiry by the Chief Court, the order of the Court being delivered by

SMYTH, J.—We think that the Additional Commissioner has not sufficiently considered the special circumstances alleged to exist in this case. It was alleged in the *dakhil kharij* proceedings, and is now again alleged for the defence, that Jiwa, who is nephew of Saudagar, was adopted by Saudagar 20 years ago when a child, and was brought up by him as a son, and acknowledged by him as such before the brotherhood, and declared on his death bed to 24th July 1877.

be his son and heir. Enquiry has not been made regarding these allegations, but if they are true, it may be that, by custom among Mussulman Jats, they would establish a right in Jiwa to succeed to Saudagar's land. The case would then apparently come within the rule referred to in case No. 54 of *Punjab Record* for 1874.

We remand the case under Section 354, Act VIII of 1859 for enquiry and finding (1) in regard to the circumstance connected with Jiwa's adoption, whether it was a mere formal adoption effected by Saudagar shortly before his death or whether it was of the kind referred to in the case above quoted (No. 54 of 1874) where a childless landowner takes a relative in infancy and brings him up as his son, and with the intention that he should succeed as his son to his land: and (2) as to whether, under the circumstances which may be found to be proved, Jiwa is entitled by any custom among Mussulman Jats of the Nawashahr tahsil to succeed to Saudagar's land.

1st March 1878.

To the above order of remand the Additional Commissioner made the following return:—

“There has now been a further investigation in this case made under Diwan Ram Nath's order by the Tahsildar of Nawashahr; the Court has found, and I concur (but with some hesitation as I do not think a very strong case is made out) that the residence of Jiwa with Saudagar for 15 years and his association with him in cultivation and his having married, to have brought about that sort of constructive adoption recognised in case No. 54 of 1874.

2. “That as such an adoption has been found, it is in accordance with custom that Jiwa should succeed to Saudagar's estate as a son.”

Upon receipt of the above return the judgment of the Chief Court was delivered by

2nd July 1878.

PLOWDEN, J.—The findings upon both the issues sent down in our previous order are in favor of the appellant, and, after hearing the respondent's counsel, we accept these findings which show that the defendant Jiwa was appointed by the deceased Saudagar as his quasi adopted son to be his heir, and that custom recognises Jiwa's right under the circumstances to inherit Saudagar's property.

The appeal is accepted and the suit dismissed with costs throughout.

No. 81.

APPELLATE SIDE. {	NAGAR MAL,—(Plaintiff),—APPELLANT,
	<i>Versus</i>
	BHAGWANDAS & BALDEO,—(Defdts.),—RESPONDENTS.

Case No. 1874 of 1877.

(SMYTH AND ELSMIE, JJ.)

Civil Procedure Code, (Act VIII of 1859), Sections 2 and 32—Res judicata—Rejection of plaint under Section 32—Institution of new suit on same cause of action.—N. M. and B. D., brothers, with their brother B. were recorded in the Settlement papers as joint owners of a holding. B. D. applied in 1877, in the Revenue department, for partition of his share, and the partition was objected to by N. M. on the ground that the holding had been divided in July 1874 by private partition and was no longer joint. The objection was disallowed, and, on 20th December 1876, a partition was made and sanctioned.

On 22nd March 1877, N. M. brought a suit against B. D. and B. to cancel the partition made in the Revenue department, but the plaint was on the same day rejected on the ground that under Section 65 of the Punjab Land Revenue Act, 1871, such a suit was not maintainable.

Meanwhile, N. M. appealed to the Commissioner from the order of partition dated 20th December 1876 made by the Revenue authorities, who on 19th July 1877 suspended that order so as to allow N. M. an opportunity to bring a civil suit. Accordingly, on 18th August 1877 N. M. brought a fresh suit against B. D. and B. to prove that the holding had been privately divided in July 1874.

Held, assuming the order in the first suit to have been passed under Section 32, Act VIII of 1859, that the second suit was barred by Section 2, Act VIII of 1859.

Where a plaint is rejected under Section 32, a fresh plaint cannot be entertained on the same cause of action.

Special appeal from order of Judicial Assistant, Umballa, dated 19th November 1877.

Nagar Mal and Bhagwan Das are brothers. They and their nephew, Baldeo, were recorded in the Settlement papers as the joint owners, in equal shares, of a holding of 11 bigas, 3 biswas of land in mouza Buria.

On the 1st February 1876, Bhagwan Das applied in the Revenue department for partition of his share. Nagar Mal objected to partition, on the ground that the holding had been already divided in July 1874 by private partition, and was no longer joint, the former co-sharers now holding their shares in severalty.

This objection was disallowed in the Revenue department and the partition proceedings went on, and eventually, on the 20th December 1876, a partition was made and sanctioned. In these proceedings no time was allowed to Nagar Mal to bring a suit in the Civil Court to prove his allegation that the holding was no longer joint.

On the 22nd March 1877, Nagar Mal brought a suit against Bhagwan Das and Baldeo, to have the partition made in the Revenue department set aside, and the alleged private partition of July 1874 upheld.

The Tahsildar, on the 22nd March 1877, rejected the plaint on the ground that under Section 65 of the Land Revenue Act such a suit was not maintainable. No appeal was brought from that order.

In the meanwhile, Nagar Mal appealed to the Commissioner from the order of partition of the 20th December 1876, and the Commissioner, on the 19th July 1877, suspended that order, so to allow Nagar Mal an opportunity to bring a civil suit to prove his

allegation that the holding had already been divided by private partition, and he remarked that such opportunity 'bought to have been previously given to him under the partition rules. Accordingly, on the 18th August 1877, Nagar Mal brought a fresh suit against Bhagwan Das and Baldeo to prove that the holding had been privately divided in July 1874.

The Tahsildar dismissed the suit as *res judicata* under Section 2, Act VIII of 1859, and the order of dismissal was upheld on appeal to the Judicial Assistant, who held that so long as the order of 22nd March 1877, dismissing the former suit stood, a second suit on the same cause of action could not be brought. The plaintiff thereupon appealed specially to the Chief Court.

The judgment of the Chief Court was delivered by

20th July 1878.

SMYTH, J.—We consider that the Judicial Assistant's order is technically correct. The order by which the former suit was dismissed may be assumed to have been passed under Section 32, Act VIII of 1859, and an appeal lay from that order under Section 36 of the Act.

The fact that provision is expressly made in Section 36 to the effect that when plaints are rejected under Sections 29 to 31, the plaintiffs are not precluded from bringing fresh plaints on the same cause of action, suggests the inference that when a plaint is rejected under Section 32 a fresh plaint cannot be entertained on the same cause of action.

The plaint in the second suit discloses substantially the same cause of action as that disclosed by the plaint in the former suit, and, that being so, we think the Lower Courts were right in refusing to entertain it. The plaintiff has, we consider, mistaken his remedy. Instead of bringing a fresh suit, he ought to have appealed from the decision in the former suit. It may be that, if he still appeals from that order to the Judicial Assistant, his appeal would, under the circumstances of the case, be considered to be within time with reference to 2nd para Section 5 of the Limitation Act, XV of 1877. With these remarks, we must dismiss the present appeal with costs.

No. 82.

MANGAL SAIN,—(Plaintiff),

Versus

DABI DAS AND GOBIND DAS,—(Defendants).

REFERENCE SIDE, {

MEHR CHAND,—(Plaintiff),

Versus

DABI DAS AND GOBIND DAS,—(Defendants).

Case No. 3 of 1878.

(SMYTH AND ELSMIE, JJ.)

Civil Procedure Code (Act X of 1877, Sections 266 and 287—Moveable property—Sale of, in execution of decree—Title acquired by purchaser—Property wrongly attached and sold—Remedies of real owner of goods.—Where moveable property belonging to A was attached and sold in execution of a decree against B, held that A was entitled to sue the auction-purchaser for the restoration of the specific moveable or for its value.

The purchaser of moveable property at an execution sale does not take an absolutely unimpeachable title to the property, and the fact that the real owner may have a remedy by a suit for damages against the execution creditor for causing the property to be attached and sold does not debar him from bringing a suit to recover the property itself from the auction-purchaser.

*Case referred by Judge Small Cause Court, Delhi, under
Section 617, Civil Procedure Code.*

Stated case.—In these cases the plaintiffs sue to recover from the auction-purchaser property which the latter had bought at an auction held in the course of execution of decree proceedings.

The decree-holder in the original case is joined in as a matter of form.

The facts, so far as they bear upon this reference, are these. In executing a decree passed in the Court by Mr. J. E. Rowe, (No. 1394, dated 7th June 1876, execution file No. 14, dated 30th January 1878), the property now claimed by the plaintiffs, and which consists of "*kalbutoon*," or gold and silver embroidery and lace work, was attached. The plaintiffs in the present cases filed objections in regard to different portions of the attached property, stating that the judgment-debtors in the original case were merely workmen employed to make up lace, &c.

These objections were filed after sale had been effected and too late for action by enquiry, and the objectors now sue to recover the property from the auction-purchasers.

The present suits are not brought to set aside the execution of decree sale, nor are they brought with a view of recovering the amount realized at auction sale. The plaintiffs' counsel has distinctly disavowed any claim on these grounds; he has stated further that he joined the name of the decree-holder in the original suit merely as a matter of form, and that he does not consider that he has any claim on, or remedy against, him, as he had acted *bonâ fide* in attaching property found in the possession of his judgment-debtor and in causing it to be sold. The plaintiffs' counsel has narrowed the case down to this one point, namely, that if the plaintiffs can show now that the property sold was theirs and was merely given to the judgment-debtors in the original case to make up, then they are entitled to recover the specific property from the auction-purchasers or the full value thereof.

The plea set up is that, provided there was no irregularity in the proceedings leading to the sale (which is not alleged), the auction purchaser of moveable property buys a clear title and the remedy of a person in the position of the present plaintiffs is by suit to set aside the sale or for compensation from the judgment-debtor. The plaintiffs rely on the general rule as to title prescribed by Section 108 of the Contract Act, and argue that the

sheriff's sale gives no title if the judgment-debtor had none, and conveys merely the right, title and interest of the latter. The reply is that :

- (1.) The Contract Act does not deal with the question of the effect of sales in market overt, and, even if these be held to be governed by it,
- (2.) An auction, held in execution of decree, is not governed by it, but by the provisions of the Procedure Code under which it is held, and that the latter contemplates a sale with a clear title in the case of moveables.

The present Procedure Code is more explicit on the point than was Act VIII of 1859. Section 315, Act X of 1877, contemplates the case of a purchaser of immoveable property being deprived of it, in consequence of defective title, and provides a remedy for him. But the Sections relating to moveable property contain no corresponding provisions and *expressio unius est exclusio alterius*.

Section 298 of the Act contemplates a suit against the purchaser for recovery of the property where there has been irregularity in the proceeding; but no other case in which he is liable is provided for. The reason why a different rule should be prescribed in the case of moveable property to that which is applied to immoveable property, would seem to be that, whereas in the latter case the auction purchaser could, with reason, be expected to satisfy himself as to the question of title before bidding, by reference to title deeds, &c., it would be impossible for him to do so in the case of moveables.

The Nazir of a Court, holding an auction of moveables, sells a large quantity of miscellaneous property, and it would be impossible to find a bidder (except at a very inadequate price) if a clear title did not pass with each lot, and if the purchaser ran the risk of having to defend one or more actions as to the original title in all he bought.

In many cases he could not possibly contest, with any hope of success, a question about which he personally knew nothing. The rule of English law as to such sales clearly is, that the purchaser has a good title, and the omission of any provisions regarding moveable property similar to those contained in Section 315, Act X of 1877, in regard to immoveable property, would lead to the inference that the Legislature adopted this rule.

Prior to the introduction of the Contract Act, the Punjab Civil Code (Tremlett) pp. 350 and 351, followed the principle prescribed by English law, and it does not appear that Section 108 of the Contract Act was intended to cancel that rule, at any rate so far as concerns sales under the Procedure Code.

Had the plaintiffs' objections been put forward in time, they could have been investigated and sale stayed pending a Civil suit, had such been necessary (see Section 278, Act X of 1877), but now the sale being regular, his only remedy, if he has one, would seem to be against the original judgment-debtor.

The question upon which, at the request of the plaintiffs, I solicit the favor of a ruling by the learned Judges of the Chief Court is this :

Where moveable property is sold by auction in a regular manner in execution of decree, can a person claiming the property (as against the judgment-debtor) sue the auction-purchaser for the specific moveable or for compensation for the value thereof?

My own opinion on the question, as will be seen from the above remarks, is that he cannot.

The following judgments were delivered by the Chief Court—

SMYTH, J.—In my opinion the question put by the Judge *26th July 1878.* must be answered in the affirmative. Under Act VIII of 1859, it was held by the Calcutta High Court that the sale of moveable property belonging to one man under an execution of a decree against another was not a mere irregularity within the meaning of Section 252 of the Act, and that when such a sale became absolute under Section 251, it transferred, under Section 249, merely the right, title, and interest of the debtor, and not of the real owner, who was entitled to sue, either for the restoration of the specific moveable or for its value as damages (*9 South. W. R., 118*).

Under the new Code, the proclamation of sale no longer declares that the sale extends only to the right, title, and interest of the judgment-debtor in the property specified, but it specifies the property itself as to be sold (Section 287, Act X of 1877). Still, I think the result is the same, so far as the question now before us is concerned. The property which an execution creditor may cause to be attached and sold in execution of a decree, is clearly defined in Section 266, Act X of 1877. It is property, moveable or immoveable, belonging to the judgment-debtor or over which, or the profits of which, he has a disposing power which he may exercise for his own benefit.

Clearly, therefore, as indeed we should *prima facie* expect to find, the property of A. is not liable to attachment and sale in execution of a decree against B., and if the decree-holder, having obtained a warrant for the goods of B., points out to the officer of the Court the goods of A. as those of B. and causes their attachment and sale, he is a wrong-doer who has procured the commission of a trespass and is responsible, even though he acts innocently or mistakenly (*12 South. W. R., 328* ; *11 Bom. Rep. 46* ; *14 W. R., 120* ; *I. L. R. 2 Bom. 258*). He acts in fact without authority of law, and the Court which is put in motion by him sells property which it is not authorized by law to sell. Such a sale cannot, in my opinion, of itself have the effect of giving a good title to the property against the real owner.

The fact that the real owner may have a remedy by a suit for damages against the execution creditor, for causing the property to be attached and sold, is no reason why he should be debarred from bringing a suit to recover the property itself from the auction purchaser.

The Sections of the new Code cited by the Judge appear to me to have little application to the present case.

It is true that Section 297 provides, as Section 251 of the old Code did, that, on payment of the purchase money, a sale of moveable property in execution of decree becomes *absolute*, but I think that must be taken to mean a sale of property which the Court had jurisdiction to sell; and in no case I think is the sale absolute in the sense that it cannot be set aside by regular suit.

There is no provision in the Code that sales of moveable property shall in no case be set aside, but only that no irregularity in publishing or conducting the sale shall vitiate the sale. It could never have been intended that if A's. property was taken and sold in execution of a decree against B., the sale should be absolute in the sense that A. could not bring a suit against the auction purchaser to set aside the sale as against him, and recover possession of his own property.

So, with regard to Sections 313 and 315. They provide a summary procedure for setting aside the sale and refunding the purchase money in the case of a sale of immovable property when the judgment-debtor had no saleable interest therein.

But the fact that the Legislature has provided a summary procedure to meet such cases cannot, in my opinion, be taken to support an inference that the Legislature meant the purchaser of moveable property at an execution sale to take an absolutely unimpeachable title to the property, and on that ground did not provide a summary procedure for setting aside the sale of such property.

The only inference that can reasonably be drawn from the omission to provide a summary procedure in the case of moveable property is that the Legislature did not consider it necessary or expedient to do so, and left any person who considered himself aggrieved to seek his remedy by regular suit.

The answer then which I would give to the Judge is that, when moveable property belonging to A. has been attached and sold in execution of a decree against B., A. is entitled to sue the auction purchaser for the restoration of the specific moveable or for its value.

26th July 1878.

ELSMIE, J.—Concurred.

CRIMINAL JUDGMENTS
1878

CRIMINAL JUDGMENTS, 1878.



Chief Court.
CRIMINAL JUDGMENTS.

No. 1.

THE CROWN *Versus* YARAM AND 4 OTHERS, ACCUSED. } REVISION SIDE.

Case No. 513 of 1877.

(LINDSAY AND FITZPATRICK, JJ.)

Criminal Procedure Code, Chapter XXXVIII, Sections 504 to 506—Security for good behaviour—Personal recognizance of bad character—Bond of surety—Recovery of amount of personal recognizance from bad character.

Held by Lindsay and Fitzpatrick, JJ., that a Magistrate can legally require a person convicted under Sections 505 and 506 to furnish a personal recognizance in addition to the security for his good behaviour.

Held further, that when there is only one surety he should bind himself only to the amount as the principal amount, and when there are several sureties they should bind themselves jointly and severally for the same amount.

Held further, by Lindsay J., that there is no provision in Chapter XXXVIII of the Code of Criminal Procedure, for the recovery of the sum mentioned in the bond entered into by the bad character himself, his surety being responsible for that sum.

Case referred by Commissioner Mooltan Division, under Section 296 of the Code of Criminal Procedure.

Some zaildars and lambardars petitioned the Court on the 19th May 1877 that the accused were addicted to thieving and were of a notoriously bad livelihood. The petition was referred for investigation to the police, who chalaned the accused on the 27th June under Section 505 Criminal Procedure Code.

The Magistrate, Manohar Lall, Extra Assistant Commissioner, exercising the powers of a Magistrate of the 1st class in the Muzaf-fargarh district, after recording evidence, convicted the five accused on the 9th July 1877, under Section 505 of the Criminal Procedure Code; and sentenced Yaram to furnish two securities of Rs. 200 each, and a personal recognizance for Rs. 200 for his good behaviour for one year; and each of the other accused to furnish two securities of Rs. 100 each and a personal recognizance of Rs. 100 for their good behaviour for one year; in default all the accused to be rigorously imprisoned for one year.

The Commissioner in submitting the case referred the following questions for the decision of the Chief Court:—

I. Can a Magistrate legally require a person convicted under Sections 504 to 506 Criminal Procedure Code to furnish a

personal recognizance in addition to security for his good behaviour as under Chapter XXXVIII, or is the Magistrate restricted to demanding security for good behaviour under Chapter XXXVIII without any personal recognizance ?

II. If a personal recognizance can be legally taken, can a Magistrate enforce its terms against the accused, and recover from him the amount mentioned in it in the event of his breaking its conditions ?

III. If a personal recognizance can be legally taken, should not the amount for which the sureties are bound correspond with the amount mentioned in the recognizance, or can security be taken for twice the amount for which the accused is personally bound, as has been done in this case ?

FITZPATRICK, J.—In answer to the first question I would say it is quite clear, from Form G. and also from the 3rd clause of Section 504 of the Criminal Procedure Code, that the security which the Code intends should be taken is the bond of the person called on to furnish security, supported by the bond of one or more sureties.

The second question need not be considered until it arises in practice.

As regards the third question, I think what is intended is that when there is only one surety (the only case apparently contemplated by those who drew Form G), he should bind himself only to the same amount as the principal obligor. When there are several sureties the proper course would be to require them to bind themselves jointly and severally for that amount.

21st Sept. 1877.

LINDSAY, J.—There is no doubt that a bond for good behaviour may be taken from a man said and proved to bear a bad character—Clause three, Section 504, Form G, Schedule II, Criminal Procedure Code.

There is no provision in Chapter XXXVIII for the recovery from such person of the sum mentioned in the bond entered into by him. His surety is responsible for that sum to the Magistrate.

The amount of the surety bond should be the equivalent of the amount entered in the bond for good behaviour.

No. 2.

DHERA SING,—(Accused),—PETITIONER,—

Versus

MUSSUMMAT NANDO,—(Complainant),—RESPONDENT.

REVISION SIDE.

Case No. 308 of 1877.

(LINDSAY AND FITZPATRICK, JJ.)

Criminal Procedure Code, Section 536—Award of separate maintenance—Incompatibility of temper—Second wife.—Held that incompatibility of temper and the presence of a second wife in the house, are legally insufficient to support an award of separate maintenance under Section 536 Act X of 1877.

The accused Dhera Sing petitioned the Chief Court under Section 297 of the Code of Criminal Procedure, to revise the order of Khan Ahmed Shah, Magistrate of the 1st Class in the Hoshiarpur district, dated 25th April 1877, directing him to pay his wife a separate maintenance of Rs. 3 per mensem.

The proceedings showed that Dhera Sing was willing to maintain his wife if she would live with him. The Magistrate found that the complainant failed to prove cruelty on the part of accused, and based his award of separate maintenance solely on the ground that, from incompatibility of temper and the presence of a second wife in accused's house, it was inexpedient that complainant and accused should continue to live together.

The Chief Court delivered the following

Judgment.—The proceedings show that the accused is will- 26th Septr. 1877, ing to maintain complainant if she will live with him.

The Magistrate distinctly finds that complainant failed to prove the cruelty on the part of accused which she alleged, and bases his award of separate maintenance solely on the ground that, from incompatibility of temper and the presence of a second wife in accused's house, it is inexpedient that complainant and accused should continue to live together.

These reasons are insufficient from a legal point of view to support an award of separate maintenance.

The Magistrate's order decreeing separate maintenance is accordingly set aside.

No. 3.

THE CROWN,—*Versus* VIRU,—ACCUSED.

(BOULNOIS AND CAMPBELL, JJ.)

Case No. 418 of 1876.

} REVISION SIDE.

Act IV of 1872, Sections 48 and 50—Tirni or Rakh rules of Jhang district—Want of publication—Conviction for breach of rules.—Certain Tirni rules for the Rakhs in the Jhang district were framed under Sections 48 and 50 of Act IV of 1872, and sanctioned by the Punjab Government in letter No. 1203, dated 17th August 1872 to address of Secretary to Financial Commissioner, but were not published in the *Punjab Gazette* as required by Section 50. *Held* that, as no publication took place, the rules were wanting in the force of law, and that a conviction under Section 50 for a breach of the said rules was accordingly invalid.

Case reported by Commissioner Mooltan, under Section 296 of the Criminal Procedure Code.

The accused, a goldsmith by profession, was reported to have cut down about 40 maunds of timber from a Government forest (rakh) which he intended to appropriate to his own use. It was found on the trial that accused had cut 20 maunds of timber; and on conviction by Sheikh Arjamand, Tahsildar, exercising

the powers of a Magistrate of the 2nd Class in the Jhang district, he was sentenced, by order dated 2nd May 1876, under Section 50 Act IV of 1872, to pay a fine of Rs. 2 or suffer two weeks simple imprisonment in default. The Magistrate further ordered the confiscation and sale of 3 hatchets found with the timber.

The Commissioner reported the case for revision on the following grounds:—

The case appears to have been properly tried under Section 50 of the Punjab Laws Act, with reference to an unpublished ruling of the Financial Commissioner of 1874; but the order directing the confiscation and sale of the hatchets is illegal, and unauthorized by law. By Section 418 Criminal Procedure Code the Magistrate was only empowered to order the disposal of property regarding which an offence appeared to have been committed, or property into which the same may have been converted, or for which it may have been exchanged, together with any thing acquired by such conversion or exchange. The hatchets in question were merely found with the timber. *Vide* Chief Court's Criminal Judgment No. 13 of 1872.

The case came on for hearing before PLOWDEN and FITZPATRICK, JJ., who remanded it on 1st August 1876 by the following—

Order.—The facts of this case do not appear to have been reported. Accused has apparently been convicted under Section 50 of the Punjab Laws Act for the breach of rules framed under Section 48 of the same Act. It is not clear what these rules are, or even if any have been framed under the section above referred to.

It is also not clear whether the rakh in which the offence took place has been, under Section 2 Act VII of 1865, declared subject to the provisions of the Forest Act. If it has, then under Section 7 of the Act the hatchets might be confiscated, but the procedure laid down in the Act before passing an order of confiscation should be followed. The files are returned for the Commissioner to report what rules are in force in the rakh in question.

In reply to the above order the Commissioner submitted copy of a letter No. 318 dated 8th September 1867 from the Officiating Deputy Commissioner of Jhang which was as follows:—

“ In reply to your No. 190 dated 19th August 1876, giving “ cover to interlocutory order of the Chief Court, sitting in “ revision of Criminal case *Crown v. Viru*, cutting timber from “ Government forests, Section 50 Act IV of 1872, I have the “ honor to state that so far as can be known in this office it does “ not appear that any rules applicable to the rakhs in this “ district have been issued under the Forest Act VII, 1865. “ It would seem therefore that the procedure cannot be justified “ on this ground.

“ 2. There is however in this office a record of a case decided “ on the Revenue side by the Financial Commissioner, in appeal

" from the Deputy Commissioner of this district and the Commissioner of the Multan Division. This record I submit for your inspection: from it you will observe that the Financial Commissioner appears to give the weight of his opinion to the procedure that was adopted by the Tahsildar. The facts of the case are essentially similar, and Mr. Egerton said then ' the petitioners should be charged criminally under Section 50 of the Punjab Laws Act,' and not (as was then done) fined on the Revenue side.

" 3. The records therefore in the Financial Commissioner's office may possibly afford the information required. Meanwhile I submit for your consideration the question in another way, thus :—

" (1). Under Section 43, Act IV, there is prohibition of use of the natural products of Government land save under rules prescribed by the Local Government.

" (2.) These rules are to be issued with certain formalities, Section 50.

" (3). But existing rules shall be deemed to have been so issued. It does not appear explicitly that the old rules need have been so formally promulgated.

" (4). In Section 22 of the *timni* rules for the *rakhs* in the district it is said ' the *timni* contractors shall have no right what-ever to the fuel or timber of their lease chaks.'

" This is equivalent to a prohibition of any such contractors taking away, or cutting any such fuel or timber.

" *A fortiori*, would it prohibit any stranger not having the status even of a contractor from so cutting fuel or timber.

" (5.) These rules appear to have been sanctioned by the Local Government in its letter No. 1203, dated 17th August 1872, to the Financial Commissioner, copy of which was forwarded to the Commissioner Multan Division, with docket No. 6236, dated 29th August 1872.

" The only doubt is whether these rules are to be considered as existing before the Act which came in force on 1st June 1872 or as issued under it. If the latter, I cannot find any notification of them in the Gazette. But if (as they retrospectively sanctioned the arrangements for the current year 1872) they be taken as previously existing, then they would appear to have legal force, and an infringement of their provisions would bring the offender under Section 50, Act IV of 1872.

" 4. Of course a simpler procedure* would be under Section 426 P. Code, or Section 379 P. Code, mischief or theft, either of which would ordinarily apply; but it seems desirable that a special offence (if it be such) be clearly shown in criminal statistics."

After the remand the case came on for hearing before BOULNOIS AND CAMPBELL, JJ., when the following orders were passed :—

* As noted in Chief Court Criminal judgment No. 4 of 1869.

7th Novr. 1877.

Having read the reply to this Court's request for the report as to what rules having the force of law regulate the rakh on which the alleged offence was committed (reply dated 11th October 1876)—this Court is not satisfied that the rules have the force of law. To determine that question this Court requires to know whether they have been sanctioned by the Governor-General in Council and published in the *Punjab Gazette*.

This case is postponed to 14th current, and the Gazette is to be searched for the required information. Application may be made to the Financial Commissioner's office for information as to the date of such publication.

14th Novr. 1877.

It now appears that no such publication took place. The rules are therefore wanting in the force of law. The conviction under them is invalid, and is accordingly cancelled.

No. 4.

PIR BAKSH,—(Accused),—PETITIONER,—

Versus

THE CROWN,—RESPONDENT.

} REVISION SIDE.

Case No. 272 of 1877.

(LINDSAY AND FITZPATRICK, JJ.)

Act IV of 1872, Section 50, Clauses 1 and 2—Penalty—Breach of Opium rules.—Clause 2 of Section 50, Act IV of 1872, having been repealed by Act XV of 1875, held that the penalty provided by that clause no longer attached to a breach of a rule made under the first clause of that section. (a)

The accused was found in illegal possession of $7\frac{1}{4}$ seers of post, which he had manufactured from poppy grown without a cultivating license, and was convicted under Section 10 of Act XXIII of 1876, by the Judicial Assistant of Gujrauwalla, exercising the powers of a Magistrate of the 1st class.

The accused petitioned the Chief Court to revise the proceedings under Section 297 of the Criminal Procedure Code, and the case was placed before a Bench with a view to the conviction being altered to one under Section 50 B. Act IV of 1872, Act XXIII of 1876 not being in force.

The case came on for hearing before Fitzpatrick and Plowden, JJ. when the case was referred to another Bench by the following order of

Plowden, J.—A question arises as to whether, since the passing of Act XV of 1875, amending Section 50 of Act IV of 1872, any penalty is legally attached to a breach of the rules framed before Act XV of 1875, to which a penalty had not been expressly attached in the rule itself before that Act was passed, and has not since been attached under the amended Section of Act IV of 1872.

The question is one that has come before me as Government Advocate: and it would therefore be better that the judicial decision upon it should be given by another Bench.

I would accordingly direct the transfer of this case to another Bench, and that notice be given to the Government Advocate.

The case was in consequence of the above order fixed for hearing before Lindsay and Fitzpatrick, JJ.

Mr. Rattigan, Officiating Government Advocate, appeared to support the conviction.

The judgment of the Court was delivered by

Fitzpatrick, J.—We think it is clear that the penalty provided by the 2nd Clause of Section 50 of Act IV of 1872 (which has been repealed by Act XV of 1875) no longer attaches to a

(a) This decision was followed in Criminal Revision Cases No. 729 of 1877 and No. 94 of 1878.

breach of a rule made under the first clause of that Section. Accordingly, the sentence passed under Act XXIII of 1876 cannot be maintained in any way. It is therefore set aside.

No. 5.

REVISION SIDE. {

THE CROWN,—Versus,—MUSSAMMAT BHURAN.

Case No. 563 of 1877.

(FITZPATRICK AND PLOWDEN, JJ.)

Indian Penal Code, Section 317—Abandonment of child.—Accused, a married woman, eloped leaving her child, 1½ months old, being at the time supported by her milk, in the house of her husband, who was in charge of it jointly with her, who was under the same legal obligation to protect it, and who the Magistrate found was certain, as the mother knew, to take care of it. *Held* by the Chief Court that there was not a “leaving with the intention of wholly abandoning” the child within the meaning of Section 317 of the Indian Penal Code, and that the conviction was therefore unsustainable.

This case was called for by the Chief Court under Section 294 of the Code of Criminal Procedure, on a review of the monthly statement for June 1877 of persons convicted by the Deputy Commissioner of Hissar.

The following judgments were delivered :—

FITZPATRICK, J.—I am of opinion that the conviction in this case cannot be sustained. I think that in order to make the “leaving” of a child an offence under Section 317 of the Code the child must be left *without protection*.

I think this is clear in the first place because the word “leave” being coupled in that Section with the word “expose,” must on the principle “*noscitur ex sociis*” be considered as to some extent taking its colour from the word “expose,” and must be construed as meaning leave under circumstances more or less resembling those of an exposure. I think this is clear further from the intention which is expressly required by the Section to constitute the offence.

There must be an intention wholly to *abandon* the child: now I think an intention wholly to abandon a child means something more than an intention to go away from it and never to return to it. The phrase to abandon a child in its ordinary acceptance means something more than merely to go away from it. In fact it seems to me that here again the idea of leaving *without protection* comes in. Now, in the present instance the accused went away leaving the child in the house of her husband, who was in charge of it jointly with her, who was under the same legal obligation to protect it that she was, and who as the magistrate expressly finds she was certain would take care of it; and this being so, I think it is clear that, if I am right in what I have said as to the construction of Section 317 of the Code, she has been wrongly convicted. I

do not think it is necessary to say what our view of the case would be if she had had any reason to believe that her husband would not do his duty to the child, or if she had gone away leaving her child in the house with relations who were under no legal obligation to take care of it, but whom she merely had reason to believe would take care of it (*see* Morgan and Macpherson's note to the section).

All that I think it is necessary to say is that, as she and her husband were jointly in charge of the child, and he was legally bound to take care of it, and she had every reason to believe that he would take care of it, she has committed no offence under Section 317 of the Code.

The circumstance that the child was only a month and a half old and was at the time the accused went away being supported by her milk is not, as it appears to me, in any way material for the purposes of the question before us.

No doubt such a child is in one sense more under the care of the mother than of the father, but this distinction seems to me altogether foreign to this section of the Code, which makes the essence of the offence punishable under it consist, as I have said, in leaving the child absolutely without protection, and not in depriving it of any special care of this sort.

To take a somewhat analogous case, it would scarcely I suppose be contended that a wet-nurse absconding from service could be punished under Section 317 as a person "having the care of a child" and "leaving it," within the meaning of that section. On these grounds I think that the circumstance that the child was so young, though it would be a circumstance of aggravation if the offence could be made out independently of it, cannot make the accused's act an offence under Section 317 if it would not otherwise be such.

I may add that the sad consequence which ultimately resulted from the accused's heartless conduct cannot be said to be in any sense a natural or probable consequence of such conduct. Ninety nine children out of a hundred who lose their mothers drink the milk of other women or are supported by other food, and the circumstance that this particular child could not be sustained in this way must be regarded as an unfortunate accident.

I do not accordingly think it necessary to consider whether a charge could be sustained against the accused under any Section of the Code other than Section 317. I would simply direct that she be released.

LOWDEN, J.—I have arrived, not without considerable hesitation, at the conclusion that this conviction may be set aside on the revision side. I think we may legitimately treat the magistrate's findings on fact, as analogous to a "special verdict" found by a jury; and so treating them, may say that as a matter of law, the prisoner on the facts found should have been acquitted. 26th Octr. 1877.

The interpretation of this Section 317 is not free from difficulty. To constitute an offence under it, as in the majority of offences

under the Code, there must be an act done attended by a criminal intention, this intention being generally to be inferred from the circumstances of the act. In this case it was necessary to prove that "the mother left her infant child with the intention of wholly abandoning it."

The circumstances are that the mother was a married woman, residing with her husband, who quitted her home, leaving there her infant child and her husband, with the specific intention of eloping with her paramour, but knowing, as the Magistrate finds, (in my opinion quite correctly) that the child would be well attended to and looked after by him, as in point of fact it was, though it eventually died. As to "leaving" the child, I think the prisoner did so within the meaning of the Section. Supposing the woman had been a widow living alone in the house with her child, or being married had during the not merely temporary absence of her husband quitted the house to elope, or for any other purpose involving an intention not to return to it, leaving the child there, I think she would have "left" her child "in some "place" within the meaning of the Section, though there would be no feature in the "leaving" to assimilate it to an "exposure," and though the house was not secluded and even contained the means of sustenance.

The act of leaving seems to me clearly made out, but that is not enough: was there a "leaving with the intention of wholly abandoning?" I think there was not, under the circumstances. The object of the Section as I understand it is to secure, by a penal sanction, to children actually helpless or presumed by law to be helpless, the protection which the law considers due to them from those who by a natural or other obligation are charged with their protection. A parent seems to me to leave a child with the criminal intention here contemplated only when he or she leaves a child, intending to leave it utterly destitute of the protection which the law desires, and endeavours to secure for it, and not otherwise. If a sole parent were to leave a child of (say) eleven years of age, having made arrangements in good faith for the nurture of the child, intending to quit this country and never to return, there would be a total abandonment so far as the parent was personally concerned; but I should hesitate to say there was an offence under the Section, because protection had been provided for the child. As other instances, I may suggest a child given in adoption or made over to a missionary, to be brought up, with an express undertaking by the parent, honestly intended to be carried out, to never again return to the child.

The difference between the case put and the one before the Court is that no arrangement for protection was made. But the circumstances of this case are such that the arrangement would have been superfluous. There was another parent, and a belief amounting to a conviction, that the child would be attended to just as well as if the mother had entered into an express arrangement with the husband. In this view, I think with Mr. Justice Fitzpatrick that it is of little consequence whether the child left is six weeks old, or six years, when the belief is honestly entertained that the other parent will duly fulfil the duty of protection.

My doubt has been whether the form of the section does not require a Court merely to see whether the accused, being one of the persons to whom the section is applicable, leaves the child with the intention that he or she will wholly abandon the child, personally, the offence being complete if the act and intention concur, and other circumstances, such as appear in the present case, being merely proper to be considered in mitigation of punishment. I am disposed to think the interpretation I have placed on the section is correct, and I think that if the section was intended to express the meaning I put upon it, it might have been drafted in the terms in which it now stands.

But even if I were to adopt the interpretation just suggested, though I should have to uphold the conviction, I should consider the case one for a nominal sentence, and should not hesitate to concur in the proposed order of release. As it is, I concur in acquitting the prisoner.

No. 6.

THE CROWN,—*Versus*,—FAZL NUR,—ACCUSED.

Cass No. 349 of 1877.

(LINDSAY AND SMYTH, JJ.)

} REVISION SIDE.

Act I of 1868, Section 2 Clause 8—British India—Upper Tanawal.—*Held* that, Upper Tanawal is an integral part of British India within the meaning of Clause 8 Section 2 Act I of 1868, and therefore, the Sessions Judge of Peshawar has jurisdiction to try offences committed to him for trial from that part of the Hazara district.

Case referred by G. R. Elsmie, Esquire, Sessions Judge, Peshawar, under Section 296 Criminal Procedure Code.

Rattigan, Officiating Government Advocate, for the Crown.

SMYTH, J.—In this case the accused was committed by Kazeo Mir Alam, Magistrate in the Hazara district, to the Sessions Court of the Peshawar Division for trial on a charge of murder, and the Sessions Judge has stayed the proceedings and forwarded the case to this Court with a view to the commitment being quashed if the Court consider under the circumstances described by him that he has no jurisdiction to try the case.

The offence is alleged to have been committed in that part of the territory of the Nawab of Amb, which is known as Upper Tanawal; and the question for decision appears to be whether Upper Tanawal is an integral part of British India within the meaning of Clause 8 Section 2 Act I of 1868. If it is, then the ordinary Criminal Courts of the Hazara district and the Sessions Judge of the Peshawar Division have jurisdiction, under the Code of Criminal Procedure, to enquire into and try offences committed in Upper Tanawal, unless it is shown that there is some enactment or provision of law under which their jurisdiction is excluded.

An opportunity was given to the Govt. Advocate to appear at the hearing before this Court, and represent the views of Government on the question raised. He appeared and argued on behalf of the Government of the Punjab, that Upper Tanawal is an integral portion of British India within the meaning of "the Act for the better government of India," and within the meaning of Act I of 1868.

In support of this view he filed "a collection of papers relating to the history, status, and powers of the Chief of Amb," printed at Lahore, at the Government Civil Secretariat Press in 1873. These are the papers referred to by the Sessions Judge in his proceeding forwarding the case to this Court for orders.

It appears from these papers that the territory in which the Nawab of Amb is interested consists of
Papers, pp. 80, 82, &c. three parts or sections :

1st. A portion Trans-Indus, consisting of the village of Amb itself, on the right bank of the river where the Nawab generally resides, and a narrow strip of country extending along the same bank to a short distance north and south of Amb.

2nd. A portion Cis-Indus, comprising the country known as Upper Tanawal, which is ordinarily spoken of as the Nawab's hereditary jaghir.

3rd. Another portion Cis-Indus, comprising the tract known as Lower Tanawal, which is the Nawab's non-hereditary jaghir.

As regards the 1st and 3rd portions there is no room for doubt, and no question arises. The first is held by the Nawab as independent territory, and the third is an ordinary jaghir and as such is subject to British Administration in every respect. It is in regard to the 2nd portion or Upper Tanawal that any doubt arises.

Soon after annexation of the Punjab, viz., in 1851, a question arose as to the extent of the power of the Nawab (then Khan) of Amb, and the Secretary to the Board of Administration in referring certain matters in that year for the orders of the Government of India submitted for the decision of Government the question,

Papers, page 48. what is the extent of internal authority which the Khan should exercise in punishing heinous crimes ?

The reply of the Government of India, No. 3339 dated 30th October 1851, is important, for it is by the interpretation put upon it that the local authorities have since been guided in determining the extent of the Khan's authority.

After stating that the President of the Board of Administration (Sir Henry Lawrence) had submitted a memo on the question, and that the Governor-General concurred with the conclusions set forth in the President's letter, the letter proceeds as follows :—

"2. Jahandad Khan's position is and probably always must be an anomalous one. His Lordship is content to regard him as a nominal tributary and subject of the British Government, not interfering in the internal affairs of his jaghir; expecting him to defend

"himself in all ordinary attacks, while the Government would defend him against formidable invasions; and thus constituting his possessions a sort of outwork between our own more valuable territory and the wild tribes beyond him.

"3. But he cannot be permitted to engage in any proceedings which shall directly or indirectly tend to the injury of British subjects, as in the recent case of the villagers of Agror.

"4. Nor can the power of life and death within his jaghir be allowed to Jehandad Khan, or to any other even nominal subject of the British Government.

"5. When these views of the Government of India shall have been clearly explained to him, the Governor-General is persuaded that Jehandad Khan will recognise the advantage of the comparative independence of his position, and that there will be no necessity for interfering regarding his ministers or any other point in the internal affairs of the district he holds."

Now, the Khan is here described and referred to, as respects his jaghir, as a subject, though a nominal one, of the British Government, and on the ground of his being a subject the power of life and death within his jaghir was withheld from him. The fair inference I think is that the jaghir must be regarded as a part of British India, though its administration except in matters involving the power of life and death was left in the hands of the Khan.

And this is the view apparently which has since been held all along by the Chief Commissioner and by the Local Government up till the present time. Thus, in a letter addressed by the Secretary to the Chief Commissioner to the

Papers page 73.

Government of India in May 1853 the Chief Commissioner stated what he considered the Khan's independence to amount to. "With respect to Jehandad Khan's case, by 'independent' the Chief Commissioner understands that he is to retain the internal control within his paternal lands situated on this side the Indus."

So in 1858, on the death of Jehandad Khan and the succession of his son, a boy of 9 years of age, the question as to the nature and extent of the Khan's authority in Upper Tanawal came under consideration in connection with a proposal made by the Commissioner of Peshawar to introduce a summary settlement of the revenue in that tract. Sir Herbert Edwardes, the Commissioner, then wrote :—

"Sir Henry Lawrence, when President of the Board of Admini-

Papers, page 79.

"nistration, wrote a minute on the Hazara jaghirs, which was ultimately submitted to Government with No. 311 of 21st May 1853, from the Secretary to the Chief Commissioner; and in that minute Sir Henry disallowed the independence of all the hereditary country Cis-Indus, thereby admitting the independence of Amb Trans-Indus. In para 4 of the Secretary to Chief Commissioner's letter No. 311 Sir John Lawrence took the same view, ruling that the Khan's independence Cis-Indus consisted in having the internal control

"of his paternal lands, in contradistinction to the purely jaghir
"tenure of the non-hereditary estates in Lower Tanawal."

The Deputy Commissioner of Hazara, Major Becher, however, dissented from the view that Upper Tanawal was an integral part of British India, and this led Sir Herbert Edwardes to go more fully into the question. He wrote: "But the real question

Papers, page 83.

"is, did the Sikhs conquer and annex
"Upper Tanawal? If they did, we are
"their successors. If they did not, then indeed Upper Tanawal
"stands on the same basis as Amb, which is trans-Indus, for that
"has confessedly remained independent." The Commissioner held
that the Sikhs did undoubtedly conquer Upper Tanawal, and
after describing the circumstances, he concludes thus. "These
"historic facts prove that the Sikhs took and held Upper Tanawal,

Papers pages 84.

"or in other words Jehandad Khan's Cis-
"Indus patrimony was in the Sikh time
"as much a portion of the Hazara province and the Sikh territory
"as the other frontier tracts of Agror, Koush, and Kahgan. That
"being the case, it is now an integral portion of the present Hazara
"district, and British territory."

On the question coming before the Chief Commissioner orders

were conveyed in his Secretary's letter
Papers, page 86. No. 23 of 8th January 1859, para 2 of

which is as follows. "The Chief Commissioner considers that
"Upper Tanawal is an integral portion of the Hazara district, and
"British territory: but with reference to its past history, and more
"especially its peculiar position and character, the tract has been
"and should continue to be dealt with as a *quasi*-independent
"chiefship.

"In the Government letter No. 3339 of the 30th October
"1851, to which Major Becher alludes in para 2, it is thus laid
"down: 'Jehandad's position is, and probably always must be,
"an anomalous one. His Lordship is content to regard him as
"a nominal tributary and subject of the British Government,
"not interfering in the internal affairs of his jagir, expecting
"him to defend himself in all ordinary attacks.'

"Therefore the Chief Commissioner considers that Upper
"Tanawal is a chiefship held under the British Government, but
"in which as a rule we possess no internal jurisdiction. The
"Chief manages his own people in his own way, without regard to
"our laws, rules, or system. This tenure resembles that on
"which the Chiefs of Pattiala, Jhind, Nabha, Kapurthala, and
"others hold their lands.

"In extreme cases the British Government no doubt have
"the power of interfering and would interfere where such inter-
"ference might appear necessary for the public good. For inst-
"ance, we might interfere during the minority of the Chief, as has
"been done in the case of Mundi. But ordinarily and as a rule
"the Chief Commissioner desires to avoid any interference."

This extract fully describes the view taken by the Chief
Commissioner of the status and authority of the Khan in 1858,
and if regard be had to the fact that at that time the orders of
the Executive Government were treated as having the force of

law, the comparison made between the Khan and the Chiefs of Pattiala, Kapurthala &c., was practically not far from accurate, as the Khan, like those Chiefs, was allowed under the order of the Government of India to administer his own territory except in matters involving the power of life and death. But the great distinction as it appears to me between Upper Tanawal and Native States properly so called, is that whereas the former is a part of British India within the meaning of Act I of 1868, and therefore has become subject to all the general laws applicable to British India which have been passed in recent years, the latter do not form a part of British India within the meaning of that Act, and therefore do not come under the operation of the Acts of the Indian Legislature. Hence, while the Penal Code and the Code of Criminal Procedure apply, in my opinion, to Upper Tanawal as to other parts of British India, they do not apply to Native States, and a comparison between Upper Tanawal and Native States which may have been practically appropriate in 1858 is no longer so.

The order of the Government of India of 1851 under which internal jurisdiction in Upper Tanawal was reserved to the Khan of Amb had no doubt the force of law, at least after the passing of the Indian Council's Act of 1861, and the Khan's jurisdiction was thereby put on a legal footing.

But that order was not one of those maintained in force by Act IV of 1872, and under schedule II of that Act it must be held to have been repealed. Since the passing therefore of Act IV of 1872 there is no enactment in force which prevents the exercise of jurisdiction by the Hazara Criminal Courts in Upper Tanawal as in other parts of the Hazara district, and it is difficult to see how it is practicable without legislation to maintain the Nawab's authority in Upper Tanawal to the extent to which it has heretofore been exercised and to which Government apparently desires to maintain it.

It is sufficient however in the present case to say that as Upper Tanawal is a part of British India, the Sessions Judge of Peshawar has jurisdiction to try offences committed to him for trial from that part of the Hazara district, and that no ground therefore has been shown for quashing the commitment. I observe from the list of cases prepared by the Deputy Commissioner as having occurred in Upper Tanawal and in which the Hazara Courts have exercised jurisdiction, that it has been the practice of the Hazara Courts to take jurisdiction in cases of murder and other heinous offences occurring in that tract, and in two of these cases sentences of death were confirmed—one in 1856 by the Judicial Commissioner and one in 1875 by the Chief Court. It does not appear however that any question of jurisdiction was raised or considered in those cases.

LINDSAY, J.—I concur in holding Upper Tanawal to be a part of British India within the jurisdiction of the Deputy Commissioner of Hazara, and that the Sessions Judge of Peshawar has jurisdiction to try and determine offences that have occurred in Upper Tanawal and have been sent to him for trial by the Deputy Commissioner of Hazara.

5th Decr. 1877.

No. 7.

REVISION SIDE. {

THE CROWN *Versus* FATTA,—ACCUSED.

Case No. 158 of 1878.

(PLOWDEN AND ELSMIE, JJ.)

Indian Penal Code, Sections 73 and 74—Solitary confinement—Month.—Accused was sentenced to 4 months rigorous imprisonment, of which one month to be in solitary confinement, and a fine of Rs. 25 or 1½ months further rigorous imprisonment in default. *Held* that the sentence of one month's solitary confinement was legal, notwithstanding that accused could not lawfully, under Section 74, Indian Penal Code, be subjected to more than 28 days solitary confinement, if the imprisonment continued for only four months.

Held further, that for the purpose of executing a sentence of solitary confinement, a month signifies a period equal to the average duration of a calendar month, that is (disregarding fractions), thirty days.

Case referred by Deputy Commissioner, Rawalpindi, under Section 296 Criminal Procedure Code.

The accused on conviction by Gunput Rai, exercising the powers of a 2nd class Magistrate in the Rawalpindi district, was sentenced under Section 457 of the Indian Penal Code to four months' rigorous imprisonment, and Rs. 25 fine or 1½ month's rigorous imprisonment in default, one month of the original imprisonment to be passed in solitary confinement.

The Deputy Commissioner reported the case for revision on the ground that, as the substantive punishment awarded was only 4 months rigorous imprisonment, the period of solitary confinement could not legally (Section 74 Indian Penal Code) exceed 28 days, whereas the solitary confinement ordered was one month.

The judgment of the Chief Court was delivered by

14th March 1878.

PLOWDEN, J.—There is nothing illegal in the order which is submitted for revision upon the face of the order. It is true that if the imprisonment continues for only four months, the prisoner cannot lawfully be subjected, under Section 74 of the Penal Code, for more than 28 days to solitary confinement. But this is a matter which relates to the execution of the order, and it is not to be presumed that the officer charged with its execution will, in the case supposed, disregard the plain directions of the law. It is also clear that if the imprisonment continues, as it may do, for the full term of 5½ months, the prisoner may lawfully be subjected to more than 28 days of solitary confinement.

It has however been suggested to us that in computing periods of solitary confinement awarded as part of a sentence one month signifies 4 weeks, and our attention has been directed to a ruling of this Court which is supposed to be an authority for this proposition.

It appears to us that the view suggested is not a correct view of the meaning of the word "month" in Section 73 of the Penal Code. In regard to a continuous term of imprisonment of one or

more months, without any fractional period, there is no difficulty in computation. A month is defined in section 49 of the Penal Code to be "a month reckoned according to the British calendar"* and in computing such month the proper course is to exclude the day of the month corresponding with that from which the computation is commenced, so that two days of the same number are not comprised in it.

But as there is no fixed standard of the duration of a calendar month, the number of days in each varying from 28 to 31, it is not so easy to determine in what manner fractional periods of a month are to be reckoned, or to what standard of computation such periods are to be referred. We think that as a month is defined to be a calendar month, it is to be presumed that the definition excludes a lunar month consisting of 4 weeks—and that we shall be most likely to give effect to the intention of the Legislature by holding that a month for the purpose of executing a sentence of solitary confinement signifies a period equal to the average duration of a calendar month, that is to say (disregarding the fraction) 30 days. It tends to support this view that in section 74, which deals with the execution of sentences of solitary confinement, a day and not a week is made the unit of calculation.

In regard to the precedent cited* it is to be observed that the point decided was that a sentence of 13 weeks' solitary confinement exceeded the legal term of 3 months. It was expressly stated in the Courts' judgment that "a term of solitary confinement of 3 months is in legal contemplation not 13 weeks but 12 weeks, *if reckoned by weeks*." This is far from deciding that a month signifies four weeks.

Having made these explanatory observations we do not consider it necessary to interfere with the sentence passed by the Magistrate in this case.

* Maxwell on Statutes, p. 310 and cases cited.

No. 8.

DHERA SING,—(Complainant),—PETITIONER,—

*Versus*MUSSUMMAT KAHNO AND TEN OTHERS,—(Accused),—
RESPONDENTS.

} REVISION SIDE.

Case No. 222 of 1877.

(PLOWDEN AND SMYTH, JJ.)

Indian Penal Code,—Sections 361 and 366—Kidnapping—Minor—Lawful guardianship.—D. S. had two wives, N. and J., by the latter of whom he had two daughters. In February 1876 he went with his wife N. to a marriage in another village, leaving J. and her two daughters at home. During the temporary absence of D. S., J. removed her two daughters to the house of her brother-in-law, M. and married the elder girl (aged 8 years) to one G., with the assistance of three other persons.

Held that the word “woman” in Section 366 Indian Penal Code, included a minor female.

Held further, that there was a kidnapping from the lawful guardianship of D. S. within the meaning of Sections 361 and 366 Indian Penal Code, notwithstanding the consent of the mother J. to the girl's removal.

Per SMYTH, J.—Because the girl, during the temporary absence of the father D. S. continued in his possession and under his control, as her lawful guardian, and was not under the guardianship of her mother J.

Per PLOWDEN, J.—Because the consent of a mere custodian in breach of the trust reposed by the person from whom the right to custody is derived, is not the consent of the guardian in whose keeping the minor still continues through the custodian.

Petition under Section 297 of the Criminal Procedure Code for revision of the order of Sirdar Alamgir, Magistrate, 1st Class, Hoshiarpur dated 17th June 1876.

Bates for Petitioner.

Rivaz for Accused.

Dhera Sing, the complainant, had two wives, Nando and Jhando, and by Jhando he has two daughters, the elder of whom is 8 years of age. In February 1876 he went with his wife Nando to a marriage in another village, leaving Jhando and her two daughters at home. On returning home 4 or 5 days afterwards he found Jhando and his two daughters missing. On enquiry he found that Jhando was in the house of her brother-in-law Maddi and that she had married the elder girl to one Gandi, with the assistance of Dula Sing and Pala Sing, and her brother Nihala.

Dhera Sing brought charges against various persons under Sections 498, 363 and 366 of the Indian Penal Code.

The Magistrate dismissed the charge under Section 366 Indian Penal Code because he considered that that section related only to the kidnapping or abducting of adult women, who were capable of giving consent, and not to minor girls who by reason

of immaturity of understanding could not give an intelligent consent. The complainant thereupon, through his pleader, petitioned the Chief Court, to revise the Magistrate's order, under Section 297 of the Criminal Procedure Code, on the ground "that the charges against the accused fell within Section 366 Indian Penal Code, there being nothing in that section restricting its protection to women of mature age only; and the Court therefore had no jurisdiction to acquit the accused."

The following judgments were delivered :—

6th Decr. 1877.

SMYTH, J.—In the interpretation which the Magistrate has put upon the section he is clearly wrong. The word "woman" used in the section includes minors as well as adults.

The Magistrate acquitted the accused Doola Sing and Pala Sing of the charge under Section 363 on the ground that they had acted with the consent of the girl's mother Jhando, who must be held to have been the "lawful guardian" of the girl at the time she was taken away within the meaning of Section 361 Indian Penal Code, and the lawful guardian having consented to the taking away of the girl, kidnapping from lawful guardianship within the meaning of Section 361 Indian Penal Code was not committed.

This raises the question whether when Dhera Sing left his house to attend a marriage in a neighbouring village and remained absent for a few days his wife Jhando, the mother of the girls, became their "lawful guardian" during the period of such absence. I do not think that she was the "lawful guardian" in the sense contemplated by the explanation to Section 361 of the Code. The father's absence was merely temporary, being only of a few days duration. The girls still remained in the possession of their father and under his control, and although their mother would naturally have care of them during his absence it can hardly be said that she was lawfully entrusted with their care or custody.

It does not appear that Dhera Sing entrusted them to her at all. I hold then that the girls remained in the lawful guardianship of their father, and that any person who took or enticed them away out of his keeping without his consent committed kidnapping from lawful guardianship even though they acted with the consent of the girl's mother.

I consider that the Magistrate's order of 17th June should be set aside and the case remanded to him for further investigation and for disposal with reference to the foregoing remarks.

6th Decr. 1877.

FLOWDEN, J.—I concur in the view of the law expressed by Mr. Justice Smyth. By Section 10 of the Code the word "woman" denotes a female human being of any age, and by Section 7, the word is used in Section 366 in conformity with the explanation of it given in Section 10.

As to the second point I think the girl was still in the keeping of the father, as lawful guardian of his daughter, though the actual custody remained during his temporary absence with the mother, as his agent. The mother may also have been a "lawful

guardian" within the meaning of the Section, so that a taking from her custody without her consent would be an offence, for the expression "lawful guardian" may be construed to include "any person lawfully entrusted with the care or custody of a minor." The consent of a mere custodian, in breach of the trust reposed by the person from whom the right to custody is derived, cannot in my opinion be taken to be the consent of the guardian in whose keeping the minor still continues to be through the custodian. If the Extra Assistant Commissioner's view is right and the mother voluntarily accompanied the girl (as appears to have been the case), then the girl was never taken out of the keeping of her lawful guardian, though her father lost all control over and possession of her.

The mistake of the Extra Assistant Commissioner seems to have been that he regarded the explanation to Section 361 as a definition of the term "lawful guardian." This it is not; though it explains that a certain description of persons is included in the term, it does not profess to define the term so as to exclude a person who on other grounds may properly be held to be a lawful guardian.

With these remarks, I concur in the order proposed.

No. 9.

AMIR CHAND AND OTHERS,—(Accused),—PETITIONERS,

Versus

THE CROWN,—(Prosecutor),—RESPONDENT.

} REVISION SIDE.

Case No. 691 of 1877.

(LINDSAY AND SMYTH, JJ.)

Indian Penal Code—Section 425—Mischief—Cutting trees for a public purpose.—The accused A. C. and another, members of the Municipal Committee of Jalalpor, permitted a tree within Municipal limits to be cut for a public purpose, against the order of the Municipal Committee as a body. *Held* that accused had not committed the offence of mischief as defined in Section 425 of the Indian Penal Code.

Petition for revision of the order of Arjamand Khan, Extra Assistant Commissioner and Magistrate 1st Class, Gujrat, dated 22nd September 1877.

Rivaz for Petitioners.

LINDSAY, J.—There is no doubt the accused permitted a kikar tree to be cut against the order of the Municipal Committee as a body, they being members of that Committee, but it was used for the well, though some portion was found in Sheikh Datt's house. I cannot agree that the offence mischief has been made out; the tree was cut for a public purpose, *viz.* for a well, and this well was being made or repaired by order of a competent authority. *Sch Decr. 1877.*

The accused were very wrong in not obeying the order of the Committee, and they have laid themselves open to reproof or such punishment as Government or the authority to whom the Committee is responsible may deem fit to give ; but to hold that as members of a Municipal Committee they have in this case committed a criminal offence is I think going too far. I do not think this prosecution should have been commenced. Far better would it have been to remove the offending members from the Committee and to appoint men of position who would feel it their duty to carry out strictly the orders of the Committee, and that it would be dishonorable to act otherwise. From the evidence and the judgment of the Extra Assistant Commissioner the constitution of this Municipal Committee appears open to revision.

I would cancel the fine imposed upon the applicants for revision, the fine imposed on Sheikh Datt, the fine on Gunpat Rai an official in the employ of the Municipal Committee, and the fine upon Lahma, the carpenter who cut the kikar tree.

8th Decr. 1877.

SMYTH, J.—I concur in the order remitting the fines. I do not think the charge of mischief is made out against the accused.

No. 10.

KESAR SINGH,—(Accused),—PETITIONER,

Versus

CROWN,—RESPONDENT.

} REVISION SIDE.

Case No. 528 of 1877.

(LINDSAY, FITZPATRICK AND PLOWDEN, JJ.)

Criminal Procedure Code, Section 303—Compensation.—Award of, to Husband whose wife has been enticed away.—Grounds for award of.—Held by Fitzpatrick and Plowden, JJ., that compensation may be awarded under Section 303 Act X of 1872 to a husband whose wife has been enticed away with criminal intent.

Per Fitzpatrick, J.—Where the case is one in which the complainant would be entitled to recover pecuniary damages, if he brought a civil action, the offence is one which can “be compensated in money” within the meaning of Section 303.

Per Plowden, J.—Compensation may be awarded for any injury caused by the offence complained of, when such injury can be compensated in money, and the injury is one in respect of which damages would be recoverable in a civil action.

Held further, by Lindsay and Plowden, JJ., that the specific ground upon which compensation is claimed and awarded should be stated by the Court, in order that the accused person may have an opportunity of contesting both his liability and the amount.

The accused in this case was convicted on the 30th June 1877 by Sirdar Surat Singh of Majithia, exercising the powers of a Magistrate of the 2nd Class in the Amritsar District, and sentenced to six months rigorous imprisonment and Rs. 150 fine, under Section 498 of the Indian Penal Code. Of the fine imposed Rs. 50 was awarded to complainant as compensation, under the provisions of Section 308 of the Criminal Procedure Code, but no reasons were recorded for awarding this sum.

The Deputy Commissioner on appeal, referring to a case quoted at page 220 of Newbery's Criminal Procedure Code, to the effect that the injury done to a husband by adultery with his wife could not be pecuniarily estimated, and adverting to the fact that complainant had got back his wife, held that he was not entitled to any compensation. He accordingly reduced the fine to Rs. 50, and set aside the order awarding compensation to complainant.

The following judgments were delivered in the Chief Court.

FITZPATRICK, J.—The Deputy Commissioner in this case has set aside the order of the lower Court awarding compensation on the grounds :— 10th Novr. 1877.

1st. That, “the injury done to a husband by adultery with “his wife cannot be estimated pecuniarily”; and

2ndly. That “as complainant has got back his wife he is “not entitled to any compensation.”

The latter ground is obviously an erroneous one. If the complainant would be entitled to compensation in respect of the adultery but for the circumstance that his wife has returned to him and he has taken her back, it is impossible to see why that circumstance should deprive him of such compensation.

The first ground is not so readily disposed of. It is not as clear as could be wished what is meant by the words (in Section 308 of the Criminal Procedure Code) "offence which can be compensated by money"; but it seems to me that in a case of this sort, in which the complainant would be entitled to recover pecuniary damages if he brought a civil action, the offence is one which can "be compensated by money" within the meaning of the Act. To hold otherwise would be to put an undue restriction on a very convenient provision of the law. I would accordingly restore the order of the first Court awarding compensation.

10th Novr. 1877.

PLOWDEN, J.—It is certainly difficult to determine what is the true meaning of the words in Section 308 Criminal Procedure Code "In compensation for the offence complained of, when such offence can in the opinion of the Court be compensated by money."

Taking into consideration that the payment may be made to the person injured, and that any sum awarded is to be taken into account in any subsequent civil proceedings relating to the same matter, I think the words may be construed to mean—"In compensation for any injury caused by the offence complained of, when such injury can be compensated in money," and that the injury must be one in respect of which damages would be recoverable in a civil action. Then if the Court having regard to the circumstances of the particular offence should be of opinion that the injury resulting from it can be compensated in money, it may award compensation.

And it is necessary that the specific ground upon which compensation is claimed and awarded should be stated, in order that the accused person may have an opportunity of contesting both his liability and the amount, and that the superior Court may have materials on which to form an opinion as to the propriety of the award, and also in order that the sum awarded may be taken into account by the Civil Court in any subsequent civil proceedings.

It would be inconsistent with the rulings of the Court in Criminal Revision case No. 113 of 1877, followed in case No. 628 of 1877, to hold that compensation may be awarded under Section 308 in all cases where a civil action would lie for damages. In these cases it was held that compensation could not be awarded for the injury caused to a widow by the homicide, negligent or wilful, of her husband, though damages might be recoverable in a civil action under Act XIII of 1855.

In the present case the first Court awarded Rs. 50 out of a fine of Rs. 159 to the complainant, who charged the accused with an offence under Section 498, of which he was convicted, that is, of taking or enticing away complainant's wife with intent that she should have illicit intercourse with some person.

The Magistrate of the District cancelled the award of compensation on the grounds that the injury done to a husband by adultery with his wife cannot be estimated pecuniarily, and (2) that as complainant had got his wife back, he was not entitled to any compensation.

The latter of these grounds is no reason for cancelling the award of compensation, if that be otherwise maintainable. The

former ground is not applicable, because there is not in this case any conviction of adultery, an offence not triable by the Magistrate, and the compensation does not appear to have been awarded in respect of adultery.

In fact it does not appear in respect of what injury the compensation was made, or on what principle the amount was calculated. It appears to me therefore that though the specific grounds upon which the Magistrate of the district set aside the award are not tenable, the award itself is not on the face of the record maintainable, even if it be conceded that an offence under Section 498 is one in respect of which compensation is legally awardable.

Under these circumstances I would decline to interfere with the magistrate of the district's order cancelling the award.

The papers must be placed before a third judge.

LINDSAY, J.—It is quite possible and it may be that in fact *24th Novr. 1877.* the complainant did suffer injury in a pecuniary sense by the loss of his wife.

That might well happen to men in the class of life to which the complainant belongs.

The first Court did not give any reasons for giving compensation, nor did it make any enquiry as to whether pecuniary loss had in fact occurred. I therefore find no valid ground for interfering with the order of the Deputy Commissioner who reversed the order of the first Court as to compensation.

This application is rejected.

No. 11.

THE CROWN,—*Versus*—JAMAL AND 11 OTHERS.

Case No. 600 of 1877.

(LINDSAY, FITZPATRICK AND FLOWDEN, JJ.)

} REVISION SIDE,

"Dunds" or ponds—Theft of fish from.—Indian Penal Code, Sections 378 and 379—possession.—The accused caught fish in the Sundri dund, a sheet of water five miles long by 20 feet broad. The right of fishing in this and other dunds had been leased to a contractor by the Government. *Held* that the fish in the pond were not in the possession of any person within the meaning of Section 378 Indian Penal Code, and could not therefore be the subject of theft.

Case referred by Deputy Commissioner Muzaffargarh, under Section 296 Criminal Procedure Code.

Bukshun, of Gujooah, Ilaqua Khangarh, obtained the license for 1876-77 to catch and sell the fish of all the "dunds" or ponds of the Khangarh Ilaqua. The accused surreptitiously and without permission of the contractor caught some fish in the "dund" or pond known as the "Sundri dund." The accused pleaded guilty,

and stated that hunger caused them to catch and eat the fish. The Honorary Magistrate found accused guilty of theft and sentenced them by order dated 10th August 1877, under Section 379 of the Indian Penal Code, to fine as follows:—

Eight persons to pay a fine of rupees 5 each, or $1\frac{1}{2}$ months' rigorous imprisonment in default.

Four persons to pay a fine of rupees 1 each, or $1\frac{1}{2}$ month's rigorous imprisonment in default.

The proceedings were forwarded by the Deputy Commissioner for revision with the following report:—

"I submit this case for revision as I have my doubts whether "the taking the fish out of the pond by the accused did not rather "create grounds for damages by Civil Court suit than for criminal "proceedings under Section 379, Indian Penal Code. I am informed that my predecessor, Mr. Tremlett, referred the contractor in similar cases to the Civil Court to recover price of the fish "taken. At the same time the English term of 'poaching' "applies to the conduct of the accused, and poaching is very like "thieving. I think the decision of higher judicial authority necessary, and therefore my action in the matter."

The following judgments were passed:—

26th Oct. 1877.

LOWDEN, J.—As I understand the statement of the facts 2 Russell on Crimes, p. 278 and of this case, the accused persons p. 280. caught fish in a pond. I consider that fish in a pond are not "movable property" within the meaning of Section 378 of the Penal Code, and cannot therefore be the subject of theft.

The convictions should accordingly be set aside, and the fines, if paid, be refunded.

LINDSAY, J.—Wild animals unreclaimed and at large are not movable property in the sense contemplated by the Code, and there cannot be a theft of such animals.

But such animals if confined within certain restricted bounds, so as to be taken at any time, may be the subject of theft.

Apparently the fish taken were enclosed in ponds and capable of being taken at any time. These ponds are, as I understand the facts, the property of the contractor for a specified term to be used by him to his profit. The accused took with fraudulent intent what was the property of the contractor at the time of the taking, and what could have been taken by him (the contractor) at any time.

Under these circumstances I would not interfere.

The judges differing in opinion the case is referred to Mr. Justice Fitzpatrick under Section 271 B. of the Criminal Procedure Code. The following judgment was delivered by .

29th Oct. 1877.

FITZPATRICK, J.—If, as I understand to be the case, the "Sundri dund," from which the accused took these fish, is a large sheet of water, several acres in extent, I think it is clear that the conviction

is not sustainable. I am of this opinion because in order to make the taking amount to theft under the Code, it is essential that it should be a taking "*out of the possession*" of some person, and no one can be said to have possession of fish in a sheet of water of such large extent. I quite agree with Mr. Justice Lindsay that the test is whether the fish are so confined that "they can be taken at any time." If they are so confined they are susceptible of being possessed, otherwise they are not; but the meaning of the question whether it is possible to take the fish at any time is not, as I understand it, whether it is possible to catch *some* of the fish, in other words to have a good day's sport, but whether it is possible to find and catch a *particular* fish. This is the view of the matter taken by the civil law (Savigny *Das recht des besitzes* Vienna 1865, p. 343) and also as far as I can gather from 2 Russell on crimes, pp. 278 and 280, by the law of England. It is, moreover, the view that is most in accordance with the ordinarily received theory of possession, and I may add that it seems to me that by adopting it for the purposes of the present question, we draw the line between theft and acts which, though they may be criminal, most persons would desire to distinguish from theft in a very simple and satisfactory manner.

I accordingly hold that fish are not susceptible of possession, and accordingly cannot be the subject of theft within the meaning of the Penal Code, unless they are so confined that it would be practicable to find and catch a particular one of them at pleasure—whether it is practicable to do this in any particular case depends mainly on the size of the enclosure. There would be no difficulty about finding and catching a particular fish in an aquarium or in one of those small tanks of 20 or 30 square yards in area, which are occasionally to be found attached to temples; accordingly the fish in such tanks may be possessed and may be stolen. On the other hand, in a large sheet of water (such as I take the "*Dund*" in this case to be,) of several acres in extent, it would be, practically speaking, impossible to find or catch a particular fish, and accordingly the fish in them cannot be the subject of possession or of theft.

A copy of this judgment must be sent to the local authorities, and they must be asked to state what the size of the *dund* is.

The Deputy Commissioner Muzaffargarh made a return to the effect that the *Sundri Dund* was about five miles long by 20 yards broad.

The case came on for hearing before Lindsay and Plowden, JJ., who passed the following

Order.—Upon the return now made by the Magistrate of the 22nd Decr. 1877, district, we set aside the conviction, and direct the fines, if paid, to be refunded.

No. 12.

PURAN,—(Accused),—PETITIONER,

Versus

THE CROWN—RESPONDENT.

} REVISION SIDE.

Case No. 456 of 1877.

(LINDSAY AND PLOWDEN, JJ.)

Excise Act, X of 1871, Sections 63 and 65—Licensed retail vendor—Agent of—Transferee of—Unlawful possession of unauthorized quantity of opium or charas.—Importation of foreign opium or charas without a pass.—The accused P. was convicted under Section 65 of the Excise Act, X of 1871, for having in his possession 10 seers of opium and 16 seers of charas, smuggled from Faridkot territory into Firozpur, he not being a licensed vendor. P. pleaded that he and his brother M. were acting as agents for the licensed vendors, K. and R. C. The Magistrate held that K. and R. C. were farmers under Section 25, Act X of 1871; that it was not proved that P. and M. were subordinate license holders as no information had been given to the Collector under Section 28; that P. smuggled opium and charas from Faridkot territory without a pass, and therefore, that P. was guilty under Section 65. The Sessions Judge (Commissioner) on appeal found that the license held by K. and R. C. was not transferable; that no license had been granted to P.; and therefore, that he could not be considered a licensed vendor.

Held that the question for decision was whether the opium and charas were in the possession of P. on his own account or as agent for the licensed vendors; and that, if in the possession of P. as agent, he was not liable to punishment under Section 65, Act X of 1871.

The license granted to a licensed retail vendor of drugs is not transferable, but such vendor may employ agents and servants in his own business, and if a transfer be made in good faith, the offence of the transferee, in being in possession of unauthorized quantities of opium and drugs, is not one calling for severe punishment.

Held further, that a licensed vendor cannot be convicted under Sections 63 and 65, Act X of 1871 for importing charas or opium from foreign territory without a pass. (a).

Petition under Section 297, Criminal Procedure Code, for revision of the order of the Sessions Judge, Lahore Division, dated 23rd June 1877 upholding the order of the Magistrate convicting the accused.

Kali Prosono Roy for Petitioner.

The facts are fully stated in the following judgment which was delivered by

PLOWDEN, J.—In this case, one, Puran, has been convicted under Section 65 of the Excise Act of 1871, for that he not being a licensed vendor had in his possession 10 seers of opium and 16 seers of charas, and has been sentenced to a fine of Rs. 100: the opium and charas being found to be smuggled from the Faridkot

18th Decr. 1877.

(a) Section 4, Act I of 1878, however, authorizes the Local Government to frame rules to regulate the transport of opium, as distinct from the possession of it, and Section 9 renders penal the transport of it in contravention of such rules.

territory on the 20th February 1877 into Mouzah Tootwala in the Firozpur Tahsil.

The defence of Puran, recorded on February 23rd 1877 before the Magistrate, was that he and his brother Mula were agents or *gomashitas* of Kalu and Rattan Chand for sale of drugs, and that the drugs seized were in his possession on behalf of the *thekadars* who had a lease for the whole year for Rs. 36. He also said that he was the *gomashita* of the *thekadars*, "without any fixed wages, or share in profits; that this was to be settled afterwards." On March 20th, Rattan Chand was examined and deposed that he had the lease of the drugs for the Tootwala mehal at Rs. 200 for the whole financial year 1876-77. He said he made over the shop in Mouzah Toot to Puran and Mula, and took from them a written agreement which he produced. He gave them, he said, no writing, but made over the Government lease that they might buy and sell on his behalf.

On the same date, Mul Chand, Puran's brother, was examined, and deposed that "the *thekadars* in appointing him fixed no special wages or share; they only said, 'sell our goods,' and we sold accordingly."

The agreement produced, dated August 22nd 1876, purports to be signed by both Mul Chand and Puran.

The agreement runs in the singular number and recites that: "I am *gomashita* of Kalu and Rattan Chand, *thekadars* of Government for drugs in Mouzah Toot, and I agree to carry on the business of the shop, and will pay to them Rs. 40 by way of profits and will sell under the terms of the *putta*. If I do otherwise, I am responsible."

The original *putta* to Kalu and Rattan Chand is not produced, but it is distinctly found by the Commissioner that Kalu and Rattan Chand were subordinate license holders,—that is, persons holding a license under Section 31 of Act X of 1871 and not farmers under Section 25.

The Commissioner refers to the original license as being with the file, but I have not been able to find it, though there is with it a printed form,—a vernacular translation of the English form given in Appendix II to Financial Commissioner's Book Circular IX of 1874,—partly filled up.

The first Court appears to have held that Rattan Chand was a farmer under Section 25 of the Act, X of 1871; that it was not proved that Mula was a subordinate license holder, because no information was given to the Collector under Section 28; and that Puran smuggled opium and charas from Faridkot territory without a pass (*ijazatuamah*) and was therefore guilty under Section 65 of the Excise Act.

The Commissioner stated the question on appeal to be: "Whether accused was a licensed vendor or not?" He found that the license held by Rattan Chand was not transferable; that no license had been granted to the accused; and he could not be considered a licensed vendor. Now, I do not think this was the real question: the question (apart from the

imputation of smuggling) was whether the opium and charas seized were in the possession of Rattan Chand, the licensed vendor, through his agent Puran, or were in Puran's possession on his own account. If it were the former case, then, as it seems to me, Puran, as the agent, is not liable to be punished under Section 65 of the Excise Act.

Whether Puran was his agent, depends upon whether the agreement produced is a genuine one, and whether it really amounts to a mere appointment of an agent, or is a transfer of the license of Rattan Chand as regards Mouzah Toot—a point to be decided in connection with the actual mode of dealing under the agreement as between Rattan Chand and Puran.

None of these points have been considered, nor has the main question been decided, and unless it is decided adversely to Puran, the conviction cannot, in my opinion, be maintained.

I concur with the Commissioner in holding that the license granted to a licensed retail vendor of drugs is not transferable; it is a personal license, and the holder is not at liberty to hand it over to another person so as to place the transferee in his own shoes, as a licensed vendor, in regard to dealing in opium and drugs. But if such a transfer be made in good faith, then the offence of the transferee, in being in possession of unauthorized quantities of opium and drugs, as a merely technically unlicensed vendor, is one that would not call of itself for so severe a punishment as a fine of Rs. 100.

But though a licensed vendor may not transfer his license, it can hardly be questioned that he is entitled, as such licensed vendor, to employ agents and servants in his own business. Indeed, this is distinctly recognized in the Book Circular already mentioned, as regards the very Section under which Puran has been convicted, (see para. 11 of the Book Circular, page 1,111 of Smyth's Acts).

As we are not in a position to decide the question which, it seems to me, arises in this case, sitting as a Court of Revision, and as its decision seems to me necessary to the proper disposal of the case, I think we should set aside the order of the Commissioner and direct that he proceed to consider and decide the question above stated.

In returning the case for this purpose, it is I think necessary to point out that there has been no charge drawn up in this case in the Magistrate's Court, and that the charge against the accused is, in the opening sentence of the Commissioner's judgment, stated to be that "Puran smuggled 10 seers of opium and 26 seers of charas from the Faridkot territory on 20th February 1877." Now, this charge is one which involves somewhat different considerations and consequences from a charge under Section 65 of the Act,—that Puran being an unlicensed vendor was in possession of a greater quantity of opium than 5 tolas weight, of which he has been convicted.

I think it is expedient to advert to the provisions of the law regarding the "smuggling" of opium and charas from foreign territory, so far as it is applicable to this case, as the law is rather

obscure and involved, and is not upon precisely the same footing as regards opium and as regards charas. By "smuggling," I mean the importation of opium or charas from foreign territory without proper authorisation. To deal with opium first.

The law at present in force in the Punjab, as Act XXIII of 1876 has not yet come into force, is contained in Act X of 1871, Act XXVI of 1872 and Act IV of 1872, Section 49 and Section 50, as amended by Act XV of 1875.

There is not in Act X of 1871 any provision which renders penal the transport of opium, except so far as transport involves possession. There is no provision in that Act for a system of passes and for penalties in regard to the transport of opium, as there is in regard to country spirits (Section 8 and Section 60), or spirituous liquors made at a distillery worked according to the English method (Section 6 and Section 63); and while Section 40 empowers the Chief Revenue Authority to frame rules for the granting of passes to persons transporting certain intoxicating drugs it does not include among these drugs opium nor is there any Section which imposes a penalty upon persons transporting the drugs, to which that Section refers, except in so far as Section 63 renders the possession of them, in certain quantities, penal.

The rules regarding opium framed under the Punjab Laws' Act, Section 49, are to be found in *Punjab Government Notification No. 1,244 of September 24th 1873* (Smyth's Acts p. 1,116).

"These rules," as stated in the opening paragraph, "do not extend to opium imported into the Punjab, but only to opium grown within the Punjab. As regards opium not grown in the Punjab, the provisions of the Excise Act relating to possession, purchase, sale, and transport are in full force."

In the Financial Commissioner's Book Circular IX of 1874, para 11, already quoted, a rule is laid down for the transport of opium,—that is for the importation of opium from foreign territory into the Punjab and its conveyance within the Punjab. That paragraph states that: "As regards opium grown out of the Punjab, the provisions of Section 65 of the Excise Act are in force. Under this Section every person, other than a licensed vendor (*i. e. a* licensed retail vendor or his agent) who has in his possession a greater quantity of such opium than 5 tolas weight is liable to fine and confiscation. Licensed retail vendors, that is the person holding the monopoly of retail vend and his agents, are allowed to make their own arrangements for the purchase of the drug in places beyond the British frontier, subject to the rules and regulations which may be in force within the Provinces through which the drug will pass.

"In all such cases the importer should take out a pass (Appendix XIV) from the place where he purchases the opium, as well as from the district where he is licensed to sell it; and when that place is in foreign territory he should apply to the Collector of the nearest district. Importers should be made to understand that if their drugs are not covered by a pass * * * the opium will be liable to confiscation and they themselves to punishment under the excise laws.

Now, this paragraph does not profess to make any new rule subjecting the person infringing it to a penalty, and it could not have that effect, if it were intended, but it professes merely, as I understand it, to explain Section 65. If, however, the rule means to lay down that a licensed vendor, or his agent, importing opium without a pass, from foreign territory into the district where he is licensed to sell, is liable to a penalty under Section 65 of Act X of 1871, it is I think clear that this is not a correct interpretation of Section 65 or any other provision of what are termed the "Excise Laws."

Therefore, as regards the 10 seers of opium found with Puran, unless it be found that it was in the possession of Puran, not as Rattan Chand's agent, but of Puran as an unlicensed vendor, Puran is not liable to any penalty. If Puran is a licensed vendor or the agent of a licensed vendor, he is not liable under the excise laws in force in the Punjab at present to any penalty for being in possession of the opium seized, merely because he had no pass, though under para. 11 of the Circular quoted, he no doubt ought to have had one.

Next, as regards charas. The law relating to the possession and transport of charas is contained in Act X of 1871, and the rules framed under the power given to the Chief Revenue Authority in Section 40 of that Act. These rules are to be found in annexure A to the Financial Commissioner's Book Circular already quoted.

Section 63 renders it penal in any person, other than a licensed vendor, or person duly authorized to supply licensed vendors, to have in his possession any larger quantity of charas than 5 tolas (Section 19). Section 40 empowers the Chief Revenue Authority to frame rules for the grant of passes to persons transporting charas for the supply of the licensed vendors of that drug. Rules have been framed accordingly as to the transport of charas, which will be found in annexure A above mentioned (Smyth's Act pp. 1,112 and 1,113) para. 7 and para. 9.

But the mere transport of charas without a pass is not under the Act rendered penal, as distinguished from the possession which transport may involve. So that a licensed vendor of charas, transporting charas in contravention of the rules under Section 40, is not liable to any penalty under the Act, merely by reason of so transporting it; and his agent is, I apprehend, in an equally good position with his principal, when acting on his behalf.

Then, if Puran be the agent of a licensed vendor of charas, he would not be liable to punishment under Section 63 or any other Section of the Act for transporting charas without a pass, although under the rules he undoubtedly ought to have procured one.

If he is not the agent of a licensed vendor, that is if the charas seized was not in his possession on account of the licensed vendor, Rattan Chand, then he is liable under Section 63, though the amount of the penalty to be imposed should of course depend in fact upon whether the alleged transfer of Rattan Chand's license to him was made in good faith, as I have already observed.

Thus, it seems to me that the question of smuggling, that is conveying the drugs seized from Faridkot territory to Mouzah Toot without a pass, is quite a subordinate question as compared with the main question, that is whether the possession of Puran was a possession on behalf of the licensed vendor Rattan Chand, or a possession upon his, Puran's, own account.

This question, I think, is one we cannot determine, though it is one that must be determined as I have already said, before the case can be finally disposed of. If it were a mere question of the construction and effect of the agreement produced by Rattan Chand, we might dispose of this case ourselves; but it is not.

That agreement has never been put forward, so far as I can discover, by Puran, nor has it yet been decided whether it is genuine.

And I am bound to add that grave suspicion attaches to this document. Its terms are not reconcilable with the statement made by Puran before its production, and it is difficult to believe that if he had executed the agreement produced, he should have forgotten or omitted to mention that fact, or the terms which it contains as to the arrangement between himself and the *thekadars*. And it is still more difficult to understand how Puran's brother, Mul Chand, giving his deposition in Court some days after his brother, and on the very day when the document was produced in Court, should have made no allusion to it, and should have made a statement as to the terms settled between him and the *thekadars* which is inconsistent with the terms of the agreement. These are matters which require explanation, and it will be open to the Commissioner, dealing with this case upon appeal, to direct further enquiry upon the points involved in the main question. When that question has been decided by the Commissioner, he will be free to pass fresh and final orders upon the appeal of Puran.

LINDSAY, J.—Concurred.

No. 13.

THE CROWN,—PROSECUTOR,

Versus

JHABA,—(Accused).

Case No. 2 of 1878.

(LINDSAY AND PLOWDEN, JJ.)

REFERENCE SIDE. }

Criminal Procedure Code (Act X of 1872) Section 327.—Evidence Act, (I of 1872,) Sections 30 and 133.—Admissibility in evidence of confession made by one of two persons accused of the same offence, who is tried separately and dies before the trial of the other. In 1873, J. and S. were concerned in the murder of one P.; J. absconded, but S., having been arrested, was placed on his trial in that year. S. in his defence at the sessions trial made a statement that J. admitted to him that he had committed the

murder. In 1877, J. having been captured was placed on his trial. S. having meanwhile died, the Sessions Judge made use of the statement of S. made at his trial in 1873, as evidence against J.

Held that the statement of S. was not admissible in evidence against J., either under Section 327, Act X of 1872, or Sections 30 and 133 of the Evidence Act, I of 1872.

Case referred by Sessions Judge, Jullundur Division, under Section 287, Criminal Procedure Code.

At a Court of Session held at Jullundur for the district of Hoshiarpur by A. Brandreth Esquire, Sessions Judge of the Jullundur Division, on the 21st day of December 1877, with the aid of three assessors, Jhaba, son of Birbal was charged, under Section 302 of the Indian Penal Code, with the murder of Phalli. The Court, concurring with the assessors, found the prisoner guilty of the charge, and sentenced him to death, subject to the confirmation of the Chief Court.

In the course of the trial, the Sessions Judge accepted as evidence, under Section 327 Criminal Procedure Code and Sections 30 and 133 of the Evidence Act 1872, the confession and defence of Sangharu, deceased, given at his trial before Mr. Melvill, Sessions Judge of the same division, in 1873, when charged with being concerned in the same murder.

The following judgments were delivered.

LINDSAY, J.—Irrespective of the statement of Sangharu given when on his trial (he is since dead), I think the evidence in this case sufficient for the conviction of the accused. The prisoner admits he killed Phalli, but says he did it in self defence and with a small stick produced in Court. Now, the medical evidence shows that death could not have been caused by that stick, but that the severe fractures were probably the result of blows inflicted with a heavy stone. It is very improbable that the accused would have smashed in the skull of Phalli after he had put the body into the earth. He killed Phalli by blows with a stone or other heavy substance and then buried him. It seems strange that he could have committed this murder alone. But his confession as to killing Phalli is clear enough, and I cannot believe him when he says he only used the small stick produced in Court, from the blows of which Phalli fell on to a stone, and so smashed in his skull. The sentence of death is confirmed.

8th Feby. 1878.

The Sections to which the Judge refers,—Sections 30 and 133 Act I of 1872, do not apply to this case, nor is Section 327 of the Criminal Procedure Code applicable.

Moreover, I do not find on the file of this case the statement of Sangharu.

PLOWDEN, J.—I consider it is proved that Jhaba caused the death of Phalli: the accused himself says so, and there is evidence which may be trusted to this extent, that the last occasion on which Phalli was seen alive, was when he went out at night with the accused, about the time that the accused says Phalli

8th Feby. 1878.

came to him at his field. It is not proved that the death was due to accident, or was caused in the manner the accused would desire the Court to believe, by the use of a light stick. The medical evidence points to death having been caused by blows with a stone, and the suggestion that the injuries might have been inflicted by stones thrown on the body at burial, is merely speculative.

There is no such provocation made out as would reduce the crime to simple culpable homicide. The accused alleges a quarrel and an assault upon him by the lumbardar. I think it is not unlikely that there was an altercation; the accused's statement is not improbable in itself, and the evidence of Shib Dial, apparently an impartial witness, tends to support it.

Nothing like an adequate motive for the deliberate murder of the lumbardar is found upon the record: and it seems more probable than not that a quarrel of some kind occurred, and it is quite likely that the accused's statement on this point is substantially true. This is to my mind nearer the truth than that the murder was committed in cold blood from motives of revenge or cupidity. In regard to the latter motive, it is not satisfactorily proved upon the record that Phalli wore and was robbed of ornaments. However this may be, the homicide is not reduced by the evidence below the degree of murder, on the score of provocation.

The question that remains is, as to the sentence. The Sessions Judge has passed sentence of death, and there seems to be no sufficient reason for refusing to confirm the sentence, though I do so with reluctance as some years have elapsed since the offence was committed, and I think it is not unlikely that some quarrel preceded the murder.

There is one other point that requires brief notice. The Sessions Judge has referred to the statement of Sangharu at his trial before Mr. Melvill as Sessions Judge, and has accepted it as evidence under Section 327 of Act X of 1872, and Sections 30 and 133 of Act I of 1872. The statement of Sangharu was clearly not admissible in evidence against Jhaba. Section 327 of Act X is somewhat loosely worded, but, upon a consideration of the whole Section, I am satisfied that it only authorises the reception of the depositions of witnesses examined in a proceeding held under that Section and not the statement other than the deposition of an accomplice, charged with the same offence. Section 30 of the Evidence Act is wholly inapplicable, as Sangharu and Jhaba were not tried jointly and Section 133 could only have applied if Sangharu had been alive at the time of Jhaba's trial and called as a witness, and then only to the extent that no objection could have been taken to his competency as a witness on the ground that he was an accomplice. Sangharu being dead when Jhaba was tried, the Section was inapplicable.

The statement of Sangharu not being admissible on any of the grounds on which it was accepted by the Sessions Judge, nor upon any other ground that suggested itself, I have not even read his statement and have formed my opinion solely upon the evidence recorded at the Sessions trial.

No. 14.

THE CROWN,—(NAJA, COMPLAINANT),

Versus

ALHOO,—ACCUSED.

} REVISION SIDE.

No. 680 of 1877.

(LINDSAY, PLOWDEN AND SMYTH, JJ.)

Criminal Procedure Code, Section 308—Compensation—Award of, to husband whose wife has been enticed away.—Accused was convicted of enticing away complainant's wife with criminal intent, Section 498 Indian Penal Code; and the fine imposed was awarded to complainant in compensation for the dishonour caused to him by the offence. *Held by PLOWDEN and SMYTH, JJ. (LINDSAY, J., dissenting)* that the award of compensation was legal under Section 308, Criminal Procedure Code.

Case reported by Commissioner, Mooltan Division, under Section 296, Criminal Procedure Code.

Accused enticed away the wife of complainant from her husband's house: complainant and his companions went in search of her and found her in the house of accused. The latter, with the assistance of his fellow villagers, detained the woman forcibly and would not give her up.

On conviction by Thakur Das, Tahsildar, exercising the powers of a Magistrate of the 2nd class in the Jhang District, accused was sentenced, by order dated 25th May 1877, under Section 498 of the Indian Penal Code, to 6 months' rigorous imprisonment and Rs. 25 fine, or 6 weeks more in default. The fine was awarded to complainant as compensation for the dishonour caused to him by the offence. The proceedings were forwarded for revision by the Commissioner on the following grounds:—

"The award of compensation appears illegal. The reason given by the Magistrate for the award is the 'dishonour' (*be hurmati*) suffered by complainant, which makes it virtually an award of damages for injury to character. Section 308, Criminal Procedure Code permits the award of compensation for any loss or damage caused directly or indirectly to any one; but it does not authorise the award of damages for injury to reputation or character. Such an award can be properly made by a Civil Court only."

The following judgments were delivered:—

LINDSAY, J.—I think the grounds given by the Magistrate are not legally sufficient. This was the view I took in case No. 528 of 1877, Criminal Revision. *15th Decr. 1877.*

I would set aside the order giving compensation.

SMYTH, J.—In this case the Magistrate convicted the accused under Section 498, Indian Penal Code, of the offence of enticing

* No. 10, *Punjab Record*, 1878,

away the complainant's wife with intent that she might have illicit intercourse with some person, and sentenced him to six months' rigorous imprisonment and Rs. 25 fine, and directed the fine to be awarded to the complainant in compensation for the dishonour caused to him by the offence. The Commissioner has certified the case to this Court for revision on the ground that the award of compensation for such an offence is illegal. The question for consideration is whether it is illegal or not.

This question came lately before a Full Bench of this Court on the Revision Side in case No. 528 of 1877.* In that case, which was one under Section 498, Indian Penal Code, the order of the Commissioner in appeal, setting aside the award of compensation as illegal, was not interfered with, but that was because it did not appear from the record in respect of what injury the compensation was given by the Magistrate, or on what principle the amount was calculated. The majority of the Judges held, as I understand their judgments, that an offence punishable under Section 498, Indian Penal Code, is one in respect of which compensation is legally awardable by the Magistrate because the complainant would be entitled to recover pecuniary damages for it if he brought a civil action; and, therefore, the offence is one which can be "compensated by money" within the meaning of Section 308, Criminal Procedure Code.

Accepting that view, I consider that the award of compensation in the present case was not illegal. The record shews that compensation was awarded to the complainant for the dishonour caused to him by the offence, and that is an injury for which he would have been entitled to recover damages if he had brought a civil action against the accused.

The case will go before a third Judge.

4th March 1878.

LOWDEN, J.—I concur in Mr. Justice Smyth's opinion.

The Magistrate was of opinion that the injury to the husband resulting from the offence under Section 498 could, under the circumstances, be compensated by money, and the injury to his honour is one in respect of which damages would be recoverable in a civil action. The case seems to me, therefore, to come within the scope of Section 308, as I understood and endeavoured to explain my understanding of that Section in Criminal Revision No. 528.*

I may point out here that in Mr. Justice Fitzpatrick's view, the scope of the Section was wider than in mine, as he considered that compensation was awardable under it in any case in which the complainant would be entitled to recover pecuniary damages if he brought a civil action. The present case would clearly fall within this broader interpretation of the Section.

The award of compensation will therefore be upheld.

* No. 10, *Punjab Record*, 1878.

No. 15.

NABI SHAH,—(Accused),—PETITIONER,

Versus

THE CROWN,—RESPONDENT.

} REVISION SIDE.

Case No. 713 of 1877.

(LINDSAY AND SMYTH, JJ.)

Indian Penal Code, Section 500—Defamation—Memorandum of Appeal—Criminal Procedure Code, Section 142—Complaint—Order by Commissioner for enquiry.—Accused, a petition-writer, wrote for presentation to the Commissioner's Court a Memorandum of Appeal in which he alleged that the order appealed from was based on "conjectural grounds," and that a certain statement made in the order was "utterly false." The Commissioner directed the Deputy Commissioner to pass a proper order in the matter, whereupon the Deputy Commissioner treated the case as one under Section 500 Indian Penal Code, and after enquiry convicted accused. *Held* that the conviction was illegal, no complaint having been made to the Deputy Commissioner within the meaning of Section 142 of the Criminal Procedure Code.

Petition under Section 297, Criminal Procedure Code, for revision of the order of the Deputy Commissioner, Gujrat, dated 29th October 1877.

Protul Chandar Chatterji for Petitioner.

The facts are sufficiently stated in the judgment of the Chief Court which was delivered by

SMYTH, J.—The accused, a petition-writer, has been convicted *18th Jan'y. 1878.* under Section 500 Indian Penal Code and sentenced to 9 months rigorous imprisonment because he wrote, for presentation to the Commissioner's Court, a Memorandum of Appeal in which it was alleged that the Court from whose order the appeal was brought had based the order on "conjectural grounds," and that a certain statement made in the order was "utterly false." The Commissioner directed the Deputy Commissioner to take the answer of the petition-writer in regard to the insulting expressions which had been used and to pass a proper order in regard to them. Thereupon the Deputy Commissioner treated the case as one under Section 500 Indian Penal Code, and after enquiry, passed the above sentence.

The case is brought before us on the Revision Side, and it is urged that under Section 142 Criminal Procedure Code the Magistrate was not competent to entertain a charge of an offence under Section 500 Indian Penal Code without a complaint, and that in this case no complaint was made.

We consider that no complaint of an offence under Section 500 Indian Penal Code was made to the Magistrate within the meaning of Section 142 Criminal Procedure Code. We set aside the conviction and direct that the accused be released.

No. 18.

APPELLATE SIDE. { AMIR SINGH, ALI SINGH AND NUR AHMAD,—(Accused),
—APPELLANTS,
Versus
THE CROWN,—(Prosecutor),—RESPONDENT.

Case No. 202 of 1877.

(PLOWDEN AND SMYTH, JJ.)

Appeal—Abatement of—Death of appellant.—A. S. appealed to the Chief Court against his conviction by the Deputy Commissioner of Jhelum. While the appeal was pending A. S. died. *Held* that the death of A. S. caused the appeal to abate.

Appeal from order of Deputy Commissioner, Jhelum, dated 23rd May 1877.

Spitta and Kali Prosono Roy for Appellants.

Rattigan, Offg. Government Advocate for Respondent.

The three accused in this case appealed against their conviction and sentence by the Deputy Commissioner of Jhelum.

While the appeal was still pending, one of the accused, Ali Sing, died, upon which a question arose as to whether or not his appeal abated.

The following judgments were delivered.

21st Jany. 1878. SMYTH, J.—I think Ali Singh's appeal should be dismissed on the merits. Ali Singh died after this appeal was instituted, and the question arose whether his appeal should not abate. That is a question on which I am not free from doubt, and I have considered it safer therefore to dispose of his appeal on the merits. If we suppose the case of an innocent person sentenced to fine and imprisonment who appeals and who dies before his appeal is determined, it seems hard that the Appellate Court should not have power to reverse the conviction and thus relieve his estate from the liability for the fine, and his reputation from the stigma attached to it by an unreversed conviction. These are, however, matters for the consideration of the Legislature and as no express provision has been made by it for the continuance of a criminal appeal after the death of the appellant, while express provision has been made for the continuance of civil appeals in like circumstances, I think on the whole that my learned colleague is right in holding that Ali Singh's appeal abates.

21st Jany. 1878. PLOWDEN, J.—Ali Singh's case is on a different footing, but before touching the merits of his appeal it is necessary to consider whether the appeal is maintainable.

Ali Singh was sentenced to a term of imprisonment and a fine of Rs. 2,000 and he died after the appeal had been admitted

and referred to a Bench. The Criminal Procedure Code contains no provision as to the effect of the appellant's death under such circumstances.

Upon consideration, I am disposed to think that the death of an appellant, in the absence of any express provision to the contrary, puts an end to the proceeding. An appeal is given for the benefit of the convicted person to relieve him, if innocent, in the eye of the law, from unmerited punishment. It is not allowed by any express provision of law to be instituted or carried on by or for the benefit of his family or his legal representatives, and neither one nor the other has, as it seems to me, an interest, recognized by the law, either in his reputation or his estate, such as to entitle them, as of right, and without express statutory permission, to maintain the appeal.

Criminal proceedings, according to the law of this country, as in England, are in form proceedings *inter partes* and to a great extent in substance also, and this principle is recognised by the provision of the Code which provides in criminal appeals (of which this is one) for the representation of the Crown. They bear a close resemblance to civil proceedings, and I am of opinion that, both in one case and the other, the death of the appellant causes the proceeding to abate, and there is a difference between civil and criminal appeals in this particular that while the law of Civil Procedure provides for the substitution of the representatives of the appellant for the appellant himself, there is no similar provision in the Code of Criminal Procedure.

It is only in cases where the sentence involves a pecuniary penalty that the appeal is likely to be pressed, but these involve a consideration of the guilt or innocence of the accused. Now, very embarrassing questions might arise in dealing with either point, under the procedure permitted by the Code. For instance, a further enquiry might be deemed necessary into the question of the innocence of the accused, and might be ordered for the express purpose of having his statement recorded and evidence produced on his behalf to rebut the case made out for the prosecution. This would be of less consequence if the order for enquiry disposed of the appeal, but it does not. When such a course is pursued the finding and sentence of the Court below are not reversed. They remain in suspense until the enquiry is terminated and a final order is passed by the Appellate Court. In short, the question before an Appellate Court upon a criminal appeal is not simply whether the Lower Court was right or wrong in finding the accused guilty upon the evidence before the Court, but is often, if not always, whether the accused person is guilty or not; or it may come to the question whether the accused person is innocent or not,—a question of which the solution may necessitate further proceedings in the nature of a trial.

Now, having regard to the general principle that a man's death puts an end to, or at least marks a *terminus* in all transactions in which he is concerned, whether inside or outside a Court of law; that in civil proceedings his death has this effect, and that they are only continuable under express provisions of the law of

Civil Procedure; that there are no similar provisions in the law of Criminal Procedure; and that embarrassing questions as to procedure may arise in attempting to deal with an appeal in which the appellant dies before judgment, which questions can only be effectually dealt with by the Legislature;—having regard to all these matters, I think I am bound to treat the case of a criminal appeal, when the appellant dies pending his appeal, as a *casus omissus* and to hold that this Court has no legal authority to pass any orders upon the appeal, under such circumstances. The family and the legal representatives have not, as it seems to me, by law, any such interest as entitles them to prosecute the appeal whatever the object in view may be, nor has the Court authority to proceed with it. The only remedy open to the former, as regards so much of the sentence as may continue operative, is, as it appears to me, by appealing to the gracious consideration of the executive Government. The point being doubtful, I have considered the question of the guilt or innocence of Ali Singh upon the charge preferred against him and of which he was found guilty. If circumstances and the law permitted such a course, I should have been disposed to remand the case for further enquiry upon charges similar to those suggested in this Court against Amir Singh; such a course was not open to me, owing to Ali Singh's death; but if I were required to express an opinion as to whether he was rightly convicted (further enquiry being impracticable) I should find that he was, notwithstanding that the evidence which he desired to be taken was excluded.

* * * * *

But it is unnecessary to follow this further, for on the opinion already expressed, I must hold that no order can be passed upon Ali Singh's appeal. The effect of this will be simply that the conviction and sentence stand unreversed.

No. 17.

J. A. KEOUGH,—(Accused),—APPELLANT,

APPELLATE SIDE. {

Versus

THE CROWN—RESPONDENT.

Case No. 89 of 1878.

(SMYTH AND ELSMIE, JJ.)

Act XXII of 1864, Sections 3, 5, 17 and 20—Officiating Cantonment Magistrate with 2nd Class Magisterial powers.—Assistant Cantonment Magistrate—Trial of breaches of Cantonment Rules and Regulations—Criminal Procedure Code, Section 84—European British subject—Appeal— On 14th September 1877, Major B. was appointed to officiate as Cantonment Magistrate of Sialkot, and invested with the powers of a Magistrate of the 2nd class. On 9th January 1878, he convicted accused of breaches of the Rules and Regulations (Clauses 30 and 32, Chapter III) framed by the Local Government under Section 17, Act XXII of 1864, for the administration of the Sialkot Cantonment, and sentenced him to pay a fine of Rs. 100. The accused at his trial did not claim to be dealt with as a European British subject, but claimed to appeal to the Chief Court as such.

Held that Major B. was only an Assistant Cantonment Magistrate under Section 5, Act XXII of 1864, notwithstanding that he was appointed by the Local Government to act as Cantonment Magistrate, and therefore that he had no jurisdiction under Section 20 of the Act to try the accused for breaches of the Cantonment Rules.

Held further, under Section 84 Criminal Procedure Code, that accused had waived his privilege as a European British subject, and, therefore, that accused was not entitled to appeal to the Chief Court.

Appeal from order of Officiating Cantonment Magistrate, Sialkot, dated 9th January 1878.

Protul Chandar Chatterji for Accused.

Henderson, Offg. Government Advocate for Respondent.

The following judgments were delivered.

ELSMIE, J.—It would appear that no appeal lies to this *30th April 1878*. Court in the present case, inasmuch as the accused did not claim to be dealt with as a European British subject, *vide* Section 84, Criminal Procedure Code. Nor does it appear that under clause 35, Chapter IV, of the Rules annexed to the Cantonment Act, XXII of 1864, the Local Government has directed by what authority appeals from the Officiating Cantonment Magistrate should be heard.

I think, however, that it is right to deal with this case on the Revision Side of the Court, and the Government Advocate, to whom notice was given, has admitted that the Officiating Cantonment Magistrate acted without jurisdiction in fining the accused under clause 32 of the Rules. It is allowed that the Officiating Cantonment Magistrate, Major Bruce, has not been invested with powers within the meaning of Section 20, Act XXII of 1864, to try breaches of Rules and Regulations made under Section 17. It is also admitted that, in any case, the penalty of Rs. 100 fine is illegal, see clause 2, Section 19, which prescribes Rs. 50 as the limit of fine. I would set aside the conviction as being made without jurisdiction and direct that the fine, if levied, be refunded.

SMYTH, J.—The accused J. A. Keough was convicted by *30th April 1878*. Major Bruce, Officiating Cantonment Magistrate of Sialkot, of breaches of the Rules and Regulations (clauses 30 and 32 Chapter III) framed by the Local Government under Section 17, Act XXII of 1864, for the administration of the Sialkot Cantonment, and was sentenced to pay a fine of Rs. 100.

From this conviction he appeals direct to this Court, alleging that he is a European British subject. It appears, however, on inspection of the record that the accused did not claim to be dealt with as a European British subject before the Magistrate, and, therefore, under Section 84 Criminal Procedure Code, he must be held to have waived his privilege as a European British subject, if he really is such. Moreover, there is nothing on the record to show, nor does the accused's Pleader allege, that the Magistrate had reason to believe that the accused was a European British subject, and it cannot therefore be contended, nor is it contended,

that the Magistrate failed in his duty under Section 84, Criminal Procedure Code, in not asking accused whether he was a European British subject or not.

This case, therefore, must be dealt with by us on the assumption that the accused is not a European British subject and on that assumption, this appeal, which is from the order of a Magistrate of the 2nd class, does not lie to this Court and must be rejected.

But I concur with my learned colleague in thinking that the case should be transferred to the Revision Side of the Court and dealt with by us as a Court of Revision, as the case is one which the Magistrate had no jurisdiction to try.

Under Section 20, Act XXII of 1864, breaches of Cantonment Rules and Regulations are triable by the Cantonment Magistrate when there is such an officer; but the Local Government may invest any Assistant Cantonment Magistrate or any other person with powers to try such breaches. Major Bruce has not been invested by the Local Government with power to try breaches of the Cantonment Rules. Therefore, unless he was Cantonment Magistrate of Sialkot at the time he tried this case, he was not competent to try it.

By Notification No. 3630 dated 14th September 1877, published in the *Punjab Government Gazette* of 20th September, Major Bruce was appointed to officiate as Cantonment Magistrate of Sialkot. But by Notification No. 3631, published in the same *Gazette*, he was only invested with the powers of a Magistrate of the 2nd class, which correspond with what used to be known as the powers of a Subordinate Magistrate. Now, Section 5, Act XXII of 1864, provides that when any person shall be invested by the Local Government with the powers of a Subordinate Magistrate within the limits of any Military Cantonment, he shall be styled the Assistant Cantonment Magistrate,—a preceding Section of the Act (Section 3) having provided that any person invested with the powers of a Magistrate within the limits of a Cantonment should be styled the Cantonment Magistrate.

Therefore, although Major Bruce was appointed by the Local Government to act as Cantonment Magistrate, inasmuch as he was not invested with the full powers of a Magistrate, he must for the purposes of the Cantonment Act (XXII of 1864) be regarded as only an Assistant Cantonment Magistrate, and consequently he was not competent, under Section 20 of the Act, to try the accused for breaches of the Cantonment Rules. This view of Major Bruce's position is in accordance with that taken by this Court of the position of the Officiating Cantonment Magistrate of Jullundur under analogous circumstances (Civil Case No. 95, *Punjab Record* for 1877).

But this case was tried by Major Bruce as a Magistrate of the 2nd class, as may be gathered from his describing himself as such at the commencement of his proceedings. As such, he had no jurisdiction to try the case, and his order imposing a fine of Rs. 100 on the accused must be set aside. The fine, if realized, should be refunded.

No. 18.

THE CROWN,—Versus,—SUBHAN.

} REVISION SIDE,

Case No. 259 of 1878.

(PLOWDEN AND ELSMIE, JJ.)

Indian Penal Code, Section 63—Fine—Excessive—Infliction of, for purpose of increasing term of imprisonment.—A fine should be fixed with due regard to the circumstances of the case in which it is imposed, and the condition in life of the offender, and not with the object of extending to the utmost possible limits the term of imprisonment to be awarded by the Magistrate trying a case.

Case referred by Deputy Commissioner, Simla, under Section 206, Criminal Procedure Code.

The accused was convicted under Section 457, Indian Penal Code, by Mr. Hewson, Assistant Commissioner, exercising the powers of a Magistrate of the 1st Class in the Simla district, and sentenced, by order dated 23rd March 1878, to two years rigorous imprisonment, including three months solitary confinement, to receive twenty stripes and to pay a fine of Rs. 500 or in default undergo one year's further rigorous imprisonment.

The Deputy Commissioner reported the case for revision on the ground that the imprisonment awarded in lieu of fine was beyond the competency of the Magistrate.

The judgment of the Chief Court was delivered by

PLOWDEN, J.—The accused in this case had been four times previously convicted of theft, and on the last occasion was sentenced to seven years' rigorous imprisonment.

6th May 1878.

The case was, therefore, clearly one which should not have been disposed of by Mr. Hewson, but should have been referred to the Magistrate of the District to be dealt with under Section 36 of the Criminal Procedure Code.

We accordingly cancel the conviction and sentence, and remand the case to the Court of the Magistrate with a view to his proceeding under Section 315 of the Criminal Procedure Code.

We also observe that the fine of Rs. 500 is obviously excessive in amount, and therefore in contravention of the provisions of Section 63 of the Penal Code. It appears to have been fixed with the object of extending to the utmost possible limits the term of imprisonment to be awarded by the Magistrate trying the case. We desire to point out that this is not a legitimate method of imposing a heavy punishment, and that a fine should be fixed with due regard to the circumstances of the case in which it is imposed and the condition in life of the offender.



No. 19.

RALLA AND SOBHA SINGH,—(Accused),—PETITIONERS, }

Versus

} REVISION SIDE;

THE CROWN,—RESPONDENT.

Case No. 557 of 1877.

(PLOWDEN AND SMYTH, JJ.)

Breach of Opium Law—Act X of 1871, Sections 58, 62 and 79—Liability of master and servant.—R., brother and servant of S., a licensed vendor of opium, sold to one A., opium in excess of the quantity allowed by law. On the conviction of R. under Section 70 of Act X of 1871, and of S. under Section 58.

Held that R. was not liable under Section 70, but could be convicted under Section 62, as he was not protected in the case of an unlawful sale by the plea of his master's authority.

Held further, (SMYTH, J. doubting) that the conviction of S. under Section 58 was good in law.

Per PLOWDEN, J.—A licensed retail vendor of opium is liable to penalties under Section 58, Act X of 1871, for a sale by his servant of an unlawful quantity of opium. It is unnecessary to show that the master knew of or authorised the particular sale. It is enough to show a general authority to the servant to sell on his master's behalf.

Absence of such knowledge and authority is ground for a mitigated penalty.

Petition under Section 297, Act X of 1872 for revision of the order of Ude Ram, Magistrate 2nd Class, Hoshiarpur, dated 1st September 1877.

PLOWDEN, J.—The facts found are these. Sobha Singh is 31st Jany. 1878, the licensed vendor of opium in the town of Anandpur: Ralla is his brother, and also acts as his servant in the shop for the sale of opium. Ralla sold a considerable quantity of opium (more than 5 tolas weight) to one Attra, and subsequently informed against Attra that he had more opium in his possession than 5 tolas weight and thus got Attra's house searched. The opium was found with Attra. Ralla's object was to obtain the reward as an informer.

The Magistrate convicted Attra under Section 65, Act X of 1871, and Ralla under Section 70, and Sobha Singh under Section 58. Ralla and Sobha Singh now apply to this Court on the Revision Side.

Upon the facts found, Ralla's conviction under Section 70 cannot stand, as that Section is directed against persons who maliciously give false information while the information given by Ralla was true, and ended in Attra's conviction.

The Magistrate also held that Ralla was liable to punishment under Section 58; but this is not so, because although he has sold a larger quantity of opium than is allowed to be sold by retail by the Act, he is not a licensed retail vendor, and, therefore, not one of the class of persons against whom the Section is directed.

But he may, upon the facts found, be held guilty, in my opinion, of an offence, punishable under Section 62, in that he, not being a licensed vendor, sold opium to Attra, in excess of the quantity which could lawfully be sold by his master, the licensed vendor, through an agent, at a single sale. In all sales of lawful quantities of opium, the servant of a licensed vendor employed to sell is a mere instrument, exercising the authority delegated to him by his master, and he is, therefore, in respect to such sales protected from personal liability; but if he makes a sale in contravention of the law under which his master is licensed, he can no longer plead his master's authority, for the master is subject to the law, and cannot authorize the servant to contravene it.

In Ralla's case, I would decline to interfere further than to alter the conviction to one under Section 62, instead of Section 70.

As regards Sobha Singh, it is found that he is a licensed retail vendor, and has sold, by the hands of his servant, a larger quantity of opium than is allowed by the Act, at a single sale, and he has been convicted under Section 58.

It is not found that Sobha Singh knew of or authorised this particular sale, or that he authorised Ralla to sell otherwise than in accordance with the conditions of the license held by himself.

The question is whether the conviction is good, and I am of opinion that it is: that a licensed retail vendor of opium is liable to penalties under Section 58 of the Act for a sale by his servant of an unlawful quantity of opium. It is unnecessary to show any knowledge or authority on the master's part to make the particular sale, it is enough to show a general authority to the servant to sell on his master's behalf.

In proceedings of this kind, that is, to recover penalties for breach of the revenue laws, if a master were not held responsible for the acts of his servant, acting within the ordinary scope of the authority which he has received from his master, the revenue laws might, as has been observed by a learned English Judge, dealing with precisely the same question, "be evaded with the utmost facility and impunity, and they would be reduced to a mere dead letter." *Attorney General v. Allen* and cases at *Manley Smith's Master and Servant*, p. 178.

Although the conviction is, in my opinion, good in law and must be maintained, I think the case is one in which a mitigated penalty might properly have been imposed, as the servant has been detected and fined, and there is no ground for holding that the master knew of or authorized the particular sale, or was aware that his servant made a practice of selling unlawful quantities.

I would accordingly reduce the penalty imposed to one rupee.

25th March 1878.

SMYTH, J.—I concur, though not without much hesitation, in regard to Sobha. The view taken of his case by my learned colleague is supported by a decision of the Calcutta High Court (*XIV W. R., Cr. 42*).

No. 20.

MUSSUMMÁT KISHEN KOUR, DEVA SING, CHATTAR
SING AND OTHERS,—(Accused),—PETITIONERS,

Versus

THE CROWN, THROUGH BHAI ANOKH SING,—(Com-
plainant),—RESPONDENT.

} REVISION SIDE.

Case No. 101 of 1878.

(PLOWDEN AND SMYTH, JJ.)

Criminal Procedure Code (Act X of 1872) Sections 66, 330 and 418—Jurisdiction—Criminal Court—Trial of subject of Native State for acts done in that State abetting an offence in British Territory—Commission for examination of witness in Foreign Territory—Disposal of property stolen in British but seized in Foreign Territory.—Held, that a Magistrate cannot, under Section 330, Act X of 1872, issue a commission for the examination of a witness in Foreign Territory.

Held also, that a subject of a Native State, who, by acts done in that State, and not in British Territory, abets the commission of an offence in British Territory, is not liable to be punished under the Penal Code, by the Courts of British India.

Held also, that a subject of a Native State is not liable to be punished under the Penal Code by a Court in British India for acts committed in British India, he being at the time of such commission in Foreign Territory, even if he afterwards be in British India.

Held also, that a Magistrate has jurisdiction under Section 418, Act X of 1872, to deal with property stolen in British Territory, notwithstanding that it may be seized in Foreign Territory and brought into British Territory by the Police.

Spitta for Accused.

Higgins for Complainant.

The facts, so far as they are material to this report, are sufficiently stated in the judgments delivered by the Chief Court.

SMYTH, J.—This is an application under Section 297, Act X of 1872, for revision of the proceedings of the Assistant Commissioner of Karnal in a case now pending in his Court.

The charges against the accused are shown above, opposite the names of each respectively.*

The theft out of which these charges have arisen, is alleged to have occurred at Sadhowal in British Territory. The accused are alleged to be residents and subjects of the Pattiala State. Their Counsel applied to the Assistant Commissioner to issue a commission, under Section 330, Criminal Procedure Code, for examination on their behalf of witnesses resident in Pattiala and Nabha; but the Assistant Commissioner refused the application, on the ground that the Section quoted did not authorize him to issue a commission for the examination of witnesses resident in Foreign Territory. The Counsel for the accused also contended before the Assistant Commissioner that he had no jurisdiction to try the accused

* The charges have been omitted as not material to this report.

for the acts charged, on the ground that the accused are subjects of the Pattiala State, and the acts charged against them were not committed in British Territory. The Assistant Commissioner held that he had jurisdiction to try all the accused on the charges above specified, except Deva Singh on the charge under Section 411 Indian Penal Code. As regards it, the Assistant Commissioner held, and rightly so, that he had no jurisdiction to try it, as the alleged receiving of stolen property by Deva Singh took place wholly in Pattiala Territory. As regards all the accused (except Deva Singh and Chattar Singh), the Magistrate found that the acts charged against them were committed by them in British Territory; and he held, therefore, that he had jurisdiction to try them. As regards the charge of abetment under Sections 380 and 109 Indian Penal Code against Deva Singh and Chattar Singh, the Magistrate considered that, although they were not British subjects, and although the acts of abetment charged against them were committed in Pattiala Territory and not in British Territory, he had jurisdiction to try them on that charge.

Mr. Spitta now admits that, on the view of the facts taken by the Magistrate, he has jurisdiction to try all the accused except Deva Singh and Chattar Singh, and in his argument before us he confined his application for revision to three points:—

I.—That the Magistrate erred in holding that he could not issue a commission under Section 330, Criminal Procedure Code, for the examination of witnesses resident in Foreign Territory.

II.—That the Magistrate erred in holding that he had jurisdiction to try Deva Singh and Chattar Singh for abetment of theft, the alleged abetment having been committed wholly in Foreign Territory, and Deva Singh and Chattar Singh not being British subjects.

III.—That the Magistrate has no jurisdiction to deal with the property alleged to be stolen, seeing that it was seized in Pattiala and not in British territory, and was brought into British Territory by the Police.

With regard to the first point, I consider the Magistrate was clearly right in refusing to issue the commission. The terms of Section 330 are clear and unambiguous. The commission is to be directed to a Magistrate in whose jurisdiction the witness may be, and the Magistrate is to proceed to the place where the witness is, or to summon him and take his evidence in the same manner and with the same powers as in trials of warrant cases. It is clear, therefore, that the Magistrate here spoken of is a Magistrate whose procedure is regulated by the Code of Criminal Procedure. But there is no such Magistrate, either at Pattiala or Nabha, where the witnesses sought to be examined reside, and there being no Magistrate, a commission could not be issued. It would have been useless to issue a commission, otherwise than in accordance with the terms of the Section, for the evidence taken on such commission would have been inadmissible and could not have been received by the Magistrate.

With regard to the second point mentioned above, the question which it raises is this: If a subject of a Native State by acts

done in that State and not in British Territory, abets the commission of an offence in British Territory, and the offence is committed there in pursuance of the abetment, and if the abettor is afterwards in British India, have our Courts jurisdiction to try him for such abetment?

I think there can be no doubt that this question must be answered in the negative. The general rule is that a Court trying an offender must have jurisdiction over the place of the offence; and

although this general rule is often modified by Legislative enactments, no enactment can be cited which would give a British Court jurisdiction to try Deva Singh and Chattar Singh for the acts charged against them, seeing that they are not British Subjects and that the acts charged were committed by them in a Foreign State, they being personally in that State at the time. This very point has been ruled by the Bombay High Court in a case reported at page 356 of *X Bom. Reports*.

I. L. R. 1 Mad. 171.

There the accused, a foreign subject resident in Foreign Territory, instigated, in Foreign Territory, the commission of a murder, which, in consequence, was committed in British Territory. The High Court held that the accused was not amenable to the jurisdiction of a British Court. The Court remarked: "The Code of Criminal Procedure extends only to British Territory, and Section 66 assumes the offence therein indicated to have been committed within a district, i. e., within a local jurisdiction created by the Code. Section 2 of the Penal Code limits the application of that law to offences committed in British India, and Pirtai (the accused) does not belong to any class made punishable by British Courts, by a special law, as contemplated by Section 3."

With regard to the third point, I consider that, if the property was stolen from complainant's Fort in Sadhowal, it did not cease to be stolen property by being taken to Pattiala, and that when found there by the Police and brought back to British Territory, it still remained stolen property. Assuming the facts to be as alleged, it would be property produced before the Magistrate regarding which an offence appeared to have been committed, and there can be no doubt, I think, that the Magistrate would be competent to deal with it under Section 418, Criminal Procedure Code.

I would direct the Magistrate that he has no jurisdiction to try Deva Singh and Chattar Singh for abetment of theft on the facts found, and would decline to interfere on the other points raised by Mr. Spitta.

I would direct the Magistrate that he has no jurisdiction to try Deva Singh and Chattar Singh for abetment of theft on the facts found, and would decline to interfere on the other points raised by Mr. Spitta.

PLOWDEN, J.—On the first of the three points taken by the Counsel for the applicants, it is clear that a commission cannot be issued under Section 330 of Act X of 1872 for the examination of a witness who is not within the limits of British India. *5th April 1873.*

The operation of the Code is limited to British India, and it contains no provision, similar to that in Section 76 of Act X of 1875 (the High Courts Criminal Procedure Act), for the examination by commission of a witness in the territories of a Native Prince or State in India in alliance with Her Majesty.

The next point is whether a person not a British subject, is liable to be punished by a Criminal Court in British India for acts committed by him in a Native State, and alleged to constitute an offence punishable under the Penal Code.

It is to be observed that it is provisionally found by the Magistrate that Deva Singh's acts were wholly committed in the Pattiala State, and that he at no time personally entered British Territory.

The Magistrate has answered this question affirmatively; but I think it is clear that it should be answered in the negative. "No proposition of law" says Lord Chief Justice Cockburn in the *Franconia* case "can be more incontestable or more universally admitted than that, according to the general law of nations, a foreigner cannot be held criminally responsible to the law of a nation not his own for acts done beyond the limits of its territory."

"The power of this country" said Dr. Lushington "is to legislate for its subjects all the world over, and as to foreigners within its jurisdiction, but no further."

"This rule must, however, be taken subject to this qualification, namely, that if the Legislature of a particular country should think fit, by express enactment, to render foreigners subject to its law with reference to offences committed beyond the limits of its territory, it would be incumbent on the Courts of such country to give effect to such enactment, leaving it to the State to settle the question of international law with the Governments of other nations."

The power of the Indian Legislative Council to make laws and regulations is derived from the Imperial Parliament, and is confined within limits, narrower than those described in the proposition of Dr. Lushington above quoted; but those limits are defined in conformity with the general principle. When the Indian Penal Code was passed in 1860, the Legislative authority of the Governor-General of India in Council was defined in Section 43 of the Statute 3 and 4 William IV C. 85, which, by Section 43, enacted that "the said Governor-General in Council shall have power to make laws and regulations for all persons, whether British or native, foreigners or others and for all Courts of justice whether established by His Majesty's Charters or otherwise and the jurisdiction thereof, and for all places and things whatsoever within and throughout the whole and every part of His Majesty's Indian territories and for all servants of the said Company within the dominions of Princes and States in alliance with the said Company." Though a judicial opinion appears to have been expressed to the contrary in the case of *Queen v. Aloo Ram* (*Perry's Oriental Cases*, 531), I think the subsequent course of Imperial legislation shows that the latter set of words I have underlined, were intended to relate to the earlier words underlined in the Section above cited, (see also *VII Bom. II. C. Rep., Criminal Cases*, p. 108).

The Statute above cited was repealed in 1861, and the Governor-General in Council is now, by the enactment marginally noted,

24 and 25 Vic. Cap. 67, empowered to make laws and regulations for all persons, whether British or

native, foreigners or others, and for all Courts of Justice whatever, and for all places and things whatever within the territories under the dominion of Her Majesty at the date of the passing of the Indian Council's Act of 1861, and for all British Subjects of

Her Majesty within the dominions of Princes and States in India in alliance with Her Majesty whether in the service of the Government of

32 and 33 Vic. Cap. 98, India or otherwise, and for all persons being native Indian subjects of Her

Majesty without and beyond, as well as within, the Indian territories under the dominion of Her Majesty. There is no power conferred in any of these Statutes to legislate for foreigners beyond the British Territories in India. It is, therefore, to be expected and it will be found to be the case that there is no express enactment by which the Indian Legislature assumes to render foreigners subject to the criminal law of British India with reference to Acts committed by them beyond the limits of British India. The intra-territorial operation of the Indian Penal Code extends, by Section 2, to every person without distinction of race or nationality for every act or omission contrary to the provisions thereof of which he shall be guilty within the said territories, after a date long since past. The general extra-territorial operation of the Code is described in Section 3, which enacts that any person liable by any law passed by the Governor-General of India in Council to be tried for an offence committed beyond the limits of the territories under the dominion of Her Majesty, shall be dealt with according to the provisions of the Code for any act committed beyond the said territories, in the same manner as if such act had been committed within the said territories.

It follows that persons who answer a given description are to be liable to punishment under the Code for any act committed by them beyond the said territories.

That description is persons liable by any law passed by the Indian Legislature to be tried for an offence committed beyond the limits of these territories. But a foreign subject does not answer to the description. There is no law passed by the Indian Legislature which renders a foreigner liable to be tried for an offence committed beyond the limits of British India. The Code of Criminal Procedure does not itself deal with the liability of any person to be tried for acts committed beyond the limits of British Territory in India. Act XI of 1872 provides for the liability to trial of British subjects for offences committed by them in places beyond the limits of British India, but makes no such provision as regards foreign subjects.

The acts of a foreigner committed by him in territory beyond the limits of British India do not, therefore, constitute an offence against the Penal Code of British India, and, consequently, a foreigner cannot be held criminally responsible under that Code

by the tribunals of this country for acts committed by him beyond its territorial limits.

Hitherto, it has been assumed that the acts done by Deva Singh were committed wholly in foreign territory, and that he personally did not enter British Territory. The question considered has been : Do these acts constitute Deva Singh guilty of an offence for which he can be punished in a Criminal Court in British India? But it is a distinct question where were these acts committed in legal contemplation.

It was argued for the Crown, that in legal contemplation these acts were committed in British Territory and that Deva Singh was liable to be tried and punished in respect of these acts as being an offence committed by him in British Territory, that is in the Karnal District, even though he never personally entered the territory or district.

This contention involves the affirmation of this proposition, that a person not a British subject may be guilty of an offence in British India, though he be personally beyond the territorial limits of British India at the time of committing the acts which are alleged to constitute the offence. This proposition cannot, in my opinion, be correctly affirmed. It may be assumed for the purpose of argument that a complete offence can be, in legal contemplation, committed by a person, personally beyond the British Territory by reason of acts done by him. But even upon that assumption, it is not, when the person is not a British subject, conclusive on the question whether the person by whom these acts were committed in legal contemplation in British Territory, is guilty of an offence against the law of British India.

When it is sought to punish a person who is not a British subject as an offender in respect of a certain act, the question is not "where was the act committed," but "was the person at the time, when the act was done, within the territory of British India." For if he was not, the act is not an offence, the doer of it is not liable to be punished as an offender, and he is, therefore, not subject to the jurisdiction of Criminal Courts, which are established for the sole purpose of enquiring into and trying offences with a view to punishing offenders. Any one who desires to investigate the reason why a foreigner is not an offender, unless he is within the territory of the power against whose law he is alleged to have offended by acts committed within its territory, and, which but for such personal absence would have been an offence against that law, should read and study the admirable judgment of Lord Chief Justice Cockburn in the case of *R. v. Keyn. (The Franco-nia case, L. R. 2 Ex. Dn. 63)*.

It is there clearly shown that the question is, as I have stated it to be: "Was the person within the territory when the act was done?" He puts the matter briefly thus:—"It is only for acts done when the person doing them is within the territory over which the authority of British law extends, that the subject of a Foreign State owes obedience to that law and can be made amenable to its jurisdiction."

This proposition is equally true of British Indian law. It is certain that the general provision of Section 2 of the Penal Code is personal in its form declaring the liability to punishment of every person for every act, contrary to its provisions of which he shall be guilty, not for every act committed by him, within the territory of British India. I desire not to be understood to intimate or to leave room for the inference that I entertain an opinion, that the Legislative Council of India has no authority to make a valid law, binding upon the Courts of India, by which foreigners should be made amenable to the jurisdiction of the Courts of this country and liable to punishment as offenders by reason of their acts committed wholly in British India, or partly in, and partly beyond, British India, they being at the time of committing such acts personally beyond the territorial limits of British India. I merely pronounce the opinion that the Indian Legislature has not hitherto enacted any law which renders the subject of a Foreign State punishable as an offender against the Penal Code for acts committed by him in British Territory, he being at the time of committing them personally beyond British Territory. In this case it has not yet been found, either as a matter of fact or of law, that Deva Singh's acts were committed in British Territory in whole or in part, and it is not material to find them, upon the view of the law above stated, unless it be held that Deva Singh was personally within British Territory when he committed the acts. For unless this be held, the Magistrate cannot lawfully convict Deva Singh of an offence punishable under the Penal Code.

On the third point, I entirely agree with my learned colleague's opinion.

I would, accordingly, pass an order directing the Magistrate to dispose of the case now pending before him, being guided in matters of law by the judgment we have pronounced, and reject the application of Mr. Spitta on the first and third points.

SMYTH, J.—In my previous remarks, I abstained from going into the question of whether, if a foreigner being personally in Foreign Territory committed acts in British India, which, if they had been committed by a person in British India, would have constituted an offence under the Indian Penal Code, and such foreigner were afterwards in British India, he would be amenable for such acts to the jurisdiction of our Criminal Courts—I abstained from considering that question, because, the case being before us as a Court of Revision, I accepted the facts as found by the Magistrate, and the facts as found by the Magistrate were that Deva Singh, being a foreigner, committed the acts charged against him wholly in Pattiala and while he was personally in the Pattiala State. It was argued, however, before us by Mr. Higgins that some of the acts charged against Deva Singh were committed by him in British Territory, though he was personally at Pattiala. One of these was that he sent letters from Pattiala to his co-accused in British Territory, abetting the commission of the theft. I observe from the recent case of the *Queen v. Rogers* (L. R. 3 Q. B. Dn., 28) it may be held that a person who sends a letter from foreign territory to a person in British India may be said to commit

5th April 1878.

an act in British India. "The reasoning is in this way: A letter "is intended to act on the mind of the recipient, its action upon "his mind takes place when it is received. It is like the case "of the firing of a shot or the throwing of a spear. If a shot "is fired or a spear thrown from a place outside the boundary of "a county into another county, with intent to injure a person "in that county, the offence is committed in the county with- "in which the blow is given; so with a letter."

As the finding of the facts by the Magistrate was only a provisional one, and as he may, on reconsideration, find that Deva Singh while at Pattiala did commit acts in British Territory, I think that my learned colleague has rightly raised the question of whether, assuming Deva Singh to have committed acts in British India, he being at the time of such commission in Pattiala Territory and a foreigner, he would, if afterwards in British India, be amenable for such acts to the jurisdiction of the British Courts. That question has been fully discussed by my learned colleague, and in the conclusion come to by him upon it, I concur.

No. 21.

THE CROWN,

Versus

SAWAN AND WAZIRA,—ACCUSED.

Case No. 205 of 1878.

(PLOWDEN AND SMYTH, JJ.)

REVISION SIDE.

Criminal Procedure Code (Act X of 1872), Section 418.—Order for disposal of stolen property.—Bonâ-fide purchaser.—In a summary proceeding under Section 418 of the Criminal Procedure Code, where stolen property is in the possession of a *bonâ-fide* purchaser, the proper order for a Magistrate to pass is to leave the property in the purchaser's possession, leaving the complainant to take such steps as he may think proper to establish his title as owner and recover possession from the purchaser.

Case referred by Commissioner, Amritsar, under Section 296, Criminal Procedure Code.

A mare belonging to one Sultan Ahmed of Sialkot was stolen. The thieves, Sawan and Wazira, were tracked to Amritsar and there let the mare loose. The accused were captured and tried in Sialkot. The mare was caught by the Police and sold by auction at Amritsar to one Imamdin.

Mr. Trafford, Magistrate of the 1st class, in the Sialkot District, in sentencing the accused, further ordered the mare to be restored to the original owner, Sultan Ahmed.

The Commissioner reported the case for revision on the ground that the order for restoration of the mare to the original

owner was, under the Chief Court's Criminal Ruling No. 7 of 1872, illegal, according to which ruling, the mare should, the Commissioner considered, remain with the auction purchaser as he bought her in market overt.

The judgment of the Chief Court was delivered by

LOWDEX, J.—It appears that the mare of the complainant was found straying and impounded and sold by the Police at auction under the Cattle Trespass Act, 1871. She was purchased by Imamdin, and resold by him to one Nur Khan, in whose possession she was found. *30th May 1878.*

There is nothing to show that these two purchases, which were clearly for valuable consideration, were otherwise than *bonâ fide* purchases, the first being at an auction sale held under the power given by the Act.

This being so, we consider the Magistrate, in a summary proceeding under Section 418 of the Criminal Procedure Code, should not have made an order directing possession of the property to be taken away from the *bonâ fide* purchaser. The question whether the complainant, under the circumstances, continued to be the owner, or whether the purchaser at the auction under the Cattle Trespass Act, 1871, had become the owner was a question on which there is room for discussion, and which could not be finally decided by the Magistrate's order.

The mare being apparently in the possession of a *bonâ fide* purchaser, we think the right order would have been to leave the mare in his possession, and the complainant to take such steps as he might think proper to establish his title as owner and to recover possession from the purchaser.

On the question of title, we express no opinion; but we consider that, under the circumstances, the purchaser had the superior claim to the possession of the mare, and we accordingly set aside the Magistrate's order directing the mare to be made over to the complainant.

We may further point out that the judgment of this Court, (Criminal Judgment No. 7 of *Punjab Record*, 1872,) cited in the order of reference, is not an authority for the proposition that the ownership of stolen property passes to a purchaser in "market overt." In that case, the Court expressly put aside from consideration the Indian Contract Act, then recently enacted. The general rules as to title and the transfer of title of goods are laid down in Section 103 which contains no exception of sales in market overt. The question of title in the present case, however, depends upon the effect of a sale under the Cattle Trespass Act of 1871, which is not affected by the provisions of the Contract Act (see Section 2).

No. 22.

THE CROWN *versus* MADHO SINGH, ACCUSED.

} REVISION SIDE.

Case No. 178 of 1878.

(SMYTH AND ELSMIE, JJ.)

Indian Penal Code, Sections 309, 320 and 325—Emasculation—Grievous hurt caused by a man to himself.—Accused emasculated himself and was convicted under Section 309, Indian Penal Code.—*Held* that the conviction under Section 309, was illegal.

Held, further, that accused could not be convicted of causing grievous hurt to himself under Section 325, Indian Penal Code.

Case reported by Deputy Commissioner, Jhelum, under Section 296, Criminal Procedure Code.

The accused, in order the better to prosecute his devotions, cut off his private parts, and on conviction by Irshad Ali, Tahsildar of Chakwal, exercising the powers of a Magistrate of the 2nd Class in the Jhelum District, was sentenced, by order dated 7th February 1878, under Section 309 of the Indian Penal Code, to three months' simple imprisonment.

The proceedings were forwarded by the Deputy Commissioner for revision on the following grounds:—

"The accused had no intention to commit suicide. Under religious enthusiasm he certainly did a very dangerous act.

"I also doubt whether it would be right to convict a man of causing grievous hurt to himself. In this event, a man could be punished much more severely for causing grievous hurt to himself, than he can for an attempt at suicide."

The judgment of the Chief Court was delivered by

ELSMIE, J.—We are of opinion that this conviction cannot be sustained. There was clearly no intention to commit suicide; the act was not ordinarily likely to cause death, nor do we think that a man can commit the offence of grievous hurt on his own person. The definition of hurt contained in Section 319, Indian Penal Code appears to contemplate the causing of pain &c., by one person to another. A man cannot attempt to murder himself. All attempts to take his own life would come under the category of attempt to commit suicide for which an express and comparatively light punishment is provided (Section 309, Indian Penal Code) and not under Section 307, Indian Penal Code. 21st March 1878.

If the preceding view were not held, the anomalous result pointed out by the Magistrate of the District would ensue, *viz.*, that a man could be punished much more severely for causing grievous hurt to himself than he can be for an attempt to commit suicide.

We set aside the conviction and sentence, and direct the release of the accused.

No. 23.

APPELLATE SIDE. }

MUHAMMAD ALI,—(Accused)—APPELLANT,

Versus

THE CROWN.—(Prosecutor,)—RESPONDENT.

Case No. 31 of 1878.

(PLOWDEN AND ELSMIE, JJ.)

Criminal Procedure Code (Act X of 1872) Section 458—Joint trial of accused persons.—Power of Appellate Court to order re-trial of one of several persons who have been jointly tried and convicted.—Admissibility of evidence of other accused upon such re-trial.—Evidence Act, Section 118.

Held that, where two persons are jointly charged and tried under the provisions of Section 458 of the Criminal Procedure Code and are convicted, and a new trial is afterwards ordered of one of such persons, the other person can upon such trial be lawfully examined as a witness.

Appeal from order of Deputy Commissioner, Gujrat, dated 3rd November 1877.

The following judgments were delivered by the Chief Court :—

18th March 1878. ELSMIE, J.—In this case Muhammad Ali, accused II, who was charged with abetment of the offence described in Section 328, Indian Penal Code, has appealed. Nur Shah, accused I, who was charged with having administered the drug has not appealed. As the two prisoners were being tried at the same time on different charges, viz. Section 328, and 328—109 respectively, the Magistrate appears to have been in error in holding that the statement of accused I could be accepted as evidence against accused II, under the provisions of Section 30 of the Evidence Act.

If we take away the statement of accused I from the whole of the evidence against accused II, very little indeed remains on which to found a conviction. It may be taken as proved that some croton seeds were discovered in the house where Muhammad Ali, accused II, lived, and that he admitted that the seeds belonged to him,—see the evidence of Alidad, No. 5 for the prosecution. But without the statement of accused I, it can hardly be said to be proved that Mitha and his family were poisoned by croton. The Civil Surgeon says that croton causes profuse purging and vomiting, but there is nothing in the recorded evidence to show that purging followed the administration of the drug by accused I. In the police papers it is expressly stated that there was no purging. One only of the poisoned family had a single motion after the meal had been eaten.

Under these circumstances, had I been disposed to agree with the Magistrate in thinking that, according to the complainant and the police, the real instigator of the crime was Mussummat Gainab Bibi, I should have been content to propose that this Court should accept the appeal and acquit the appellant. But on examining the

police papers I find that Mitha in the first instance expressly charged appellant and gave probable reasons for the enmity. This fact is supported by the evidence of Muhammad, witness No. 3 for prosecution, who distinctly says that Mitha charged appellant at once. There is therefore good *prima facie* ground for believing that Mitha has been persuaded by mutual friends to drop this charge against an influential person and has thereby rendered himself liable to prosecution on alternative charges of giving false evidence before the Magistrate or giving false information to the police.

Under Section 280, Act X of 1872, as amended by Section 28, Act XI of 1874, it is now competent to this Court on the appellate side to order a re-trial. I would therefore pass such an order in regard to Muhammad Ali, pointing out to the Magistrate that as Nur Shah, accused I, has accepted his conviction, no objection exists to taking his evidence on solemn affirmation at the new trial.

FLOWDEN, J.—The appellant Muhammad Ali and one Nur Shah were jointly tried by the Magistrate of the District of Gujrat, the former upon a charge under Sections 328—109, and the latter upon a charge under Section 328, and both were convicted. Muhammad Ali has appealed to this Court, but Nur Shah has preferred no appeal and the time for appealing has expired. 13th April 1878.

The Magistrate has taken into consideration against Muhammad Ali the statement made by Nur Shah in his examination by the Magistrate, and in doing so he has undoubtedly used, as evidence against the appellant, statements which could not lawfully be considered against him. Apart from Nur Shah's statement, the evidence recorded is, as my learned colleague has also pointed out, insufficient, but there is at the same time reason to believe that the appellant was concerned with Nur Shah in the offence of which the latter has been convicted. My learned colleague accordingly proposes to direct a new trial of Muhammad Ali, and has pointed out, for the information and guidance of the Magistrate, that Nur Shah may lawfully be examined as a witness at the new trial.

Upon consideration, I concur in the view of the law expressed by my learned colleague on this point. The precise question is whether, if two persons are jointly charged and tried under the provisions of Section 458 of the Criminal Procedure Code and are convicted, and a new trial is afterwards ordered of one of such persons, the other person can, upon such trial, be lawfully examined as a witness.

I put this question in this form because it seems to me beyond doubt that the Court is competent to order a new trial of the appellant alone, when of two accused persons jointly tried, only one appeals. There is neither reason nor rule for the position that under such circumstances a new trial must be ordered of both persons.

Then the question is, whether on such trial, a person who was at the first trial jointly charged and tried and convicted can lawfully be examined as a witness.

Now, so far as the law of evidence affects the question, there is no doubt that an accused person is not incompetent to testify for or against another person jointly charged with him, merely by reason of his being an accused person. *Primâ facie* all persons are competent to testify, and there is no provision in Section 118 or elsewhere in the Evidence Act which renders an accused person incompetent to testify.

It may be conceded for the present purpose that one of two accused persons jointly charged cannot, while they are being jointly tried, be lawfully examined as a witness either for or against the other. If this be so, it is so not because of incompetency in the accused person, as such, but because of the positive rules of Criminal Procedure, that is, because, by Section 331 of the Criminal Procedure Code, all witnesses in a Criminal Court must be examined upon oath or affirmation or otherwise according to the law for the time being in force in relation to the examination of witnesses, and because, by Section 345 of the Code, no oath or affirmation shall be administered to the accused person.

I say this may be the case in respect of two persons being jointly tried, without expressing an opinion as to whether it is so, first, because it is not now necessary to decide the point, and secondly, because it is not certain that the Section last quoted operates further than to disqualify an accused person from testifying as a witness for or against himself.

But I think it is clear that, even if it be conceded that an accused person cannot lawfully testify for or against another who is being jointly tried with him, since the incapacity arises, if at all, from the positive rules in Sections 331 and 345 of the Procedure Code alone, it continues only so long as the person whose testimony is required is in the position in which alone these Sections are applicable to him, that is to say, in the position of a person himself upon his trial. In the present case, it is clear that, on the new trial, Nur Shah will no longer be an accused person but a convict who has been sentenced. However that circumstance may affect the weight of evidence when given, it seems to me clear that there is nothing in the Evidence Act or in the Criminal Procedure Code which renders his examination as a witness unlawful, or his evidence inadmissible against Muhammad Ali. I may observe that, under the English law of evidence at common law, a prisoner who had pleaded guilty but not been sentenced was a competent witness for or against a person jointly indicted with him, and it does not appear ever to have been decided that, at common law, where several prisoners are being jointly tried, they are not competent and compellable to give evidence for or against each other.

By recent statutes the disqualification by reason of infamy which formerly attached at common law to an accused person who had been convicted and sentenced for certain offences, has been removed. It is now clear that, when several persons are jointly indicted and one of them is convicted, either on his own confession or by verdict, and sentenced before the trial of the others is concluded, the prisoner so sentenced is rendered compe-

tent either for or against the others. And a witness who has been previously convicted on a separate indictment is clearly rendered competent by Statute, 3 Russ. on Crimes, 621, 628. These are cases which resemble, though they are not exactly similar to the case now before us.

For the reasons I have already given I am of opinion that there is no valid objection to the order proposed by my learned colleague, which, in other respects, seems to me appropriate to the circumstances of the case and I accordingly concur in it.

No. 24.

THE CROWN BY SUBA,

Versus

I ABDULLA, II MUSSUMAT RAJJI, III MUSSUMAT
GOURI,—ACCUSED.

} REVISION SIDE,

Case No. 157 of 1878.

(SMYTH, J.)

Appeal—Right of, after enhancement of punishment by Chief Court.—A. and M. R. were convicted under Section 498 Indian Penal Code, and sentenced by the Board of Honorary Magistrates at Amritsar, exercising 2nd Class powers, to pay fines of Rs. 25 and Rs. 5 respectively, but preferred no appeal. The Magistrate of the District reported the case under Section 296, Criminal Procedure Code, and the Chief Court enhanced the punishment by six months' rigorous imprisonment. Thereupon A. preferred an appeal to the Chief Court against the conviction.

Held, that as the conviction was by the Honorary Magistrates, the appeal lay under Section 266, Criminal Procedure Code, to the Magistrate of the District.

The accused, I and II, in this case were convicted by the Board of Honorary Magistrates for the City of Amritsar exercising 2nd Class powers, and sentenced on 28th January 1878, under Section 498, Indian Penal Code, to pay fines of Rs. 25 and Rs. 5 respectively.

The accused preferred no appeal to the Magistrate of the District. That officer reported the case under Section 296, Criminal Procedure Code for enhancement of punishment, and on 28th March 1878 the sentence was enhanced by six months' rigorous imprisonment by Smyth and Elsmie, JJ.

Accused Abdulla wished to appeal, and filed an appeal in the Chief Court.

The petition of appeal presented by Abdulla was referred to Smyth, J. for orders as to its disposal, with a note by the Deputy Registrar pointing out that in Criminal Revision Case No. 759 of 1877 it had been held by Plowden and Smyth JJ., that a fresh

period of appeal ran from the passing of the new sentence ; but that was a case in which the Magistrate was directed to summon the accused before him and pass the sentence which the Court indicated in its order as the appropriate one,

The following order was recorded by

25th May 1878.

SMYTH, J.—I consider the appeal should be heard by the Deputy Commissioner. The sentence passed by the Honorary Magistrates was enhanced by this Court, but the conviction was by the Honorary Magistrates, and the appeal, therefore, under Section 266 Act X of 1872, lies to the Magistrate of the District.

No. 25.

GULZARI MALL,—(Accused),—PETITIONER,

Versus

MALLA,—(Complainant),—RESPONDENT.

} REVISION SIDE.

Case No. 830 of 1877.

(PLOWDEN AND SMITH, JJ.)

Cattle Trespass Act I of 1871, Section 22—Compensation for wrongful seizure.—*Held*, that the award under Section 22, Act I of 1871, should be by way of reasonable compensation for loss caused by seizure and detention of cattle, and not by way of penalty on the person complained against, or of an award of general damages to the complainant.

The complainant charged Elahi Buksh and Abdulla, servants of Gulzari Mall, with illegal seizure of cattle. Gulzari Mall, while the case was under trial before the Cantonment Magistrate of Jullundur, of his own accord admitted his liability for the actions of his servants, and took all the responsibility of their acts on himself. The Cantonment Magistrate finding the seizure to have been illegal, ordered that Gulzari Mall should pay to complainant Rupees 30 as compensation for the illegal seizure of his cattle, under Section 22, Act I of 1871.

Gulzari Mall accordingly applied to the Chief Court, under Section 297, Criminal Procedure Code, for revision of the order of the Cantonment Magistrate, on the ground that a master could not be held liable under Chapter V, Act I, of 1871, for the Acts of his servants.

The judgment of the Chief Court was delivered by

PLOWDEN, J.—It is plain upon the record that the petitioner *22nd Feby. 1878.* Gulzari Mall accepted the responsibility for his servants' acts, and thereby prevented the complainant from getting an award under Act I of 1871, Section 22, against them. We do not think we are bound under these circumstances, sitting on the revision side, to interfere at his instance to set aside the order *in toto* upon the ground that a master cannot be held liable under Chapter V of Act I of 1871, for the acts of his servants.

Whether the award of compensation can be upheld is a different matter. There is nothing to show how the Magistrate arrived at the amount awarded, Rs. 30, which strikes us as a large amount, seeing that the cattle impounded were only four in number and released on the evening of the same day they were seized, at a cost to the complainant of only one rupee for fines. It does not appear that there were any other fines or expenses levied, and the complainant in this Court only estimates his own loss at Rs. 4, saying that the cattle would, if sold, on the date of seizure have fetched an additional rupee a piece.

The award under Section 22 of the Act is by way of reasonable compensation "for the loss caused by the seizure and detention," and not by way of a penalty on the person complained against, or of an award of general damages to the complainant, and we find nothing in the record to justify an award of a larger

sum than Rs. 4 on this account in addition to Re. 1, the fine paid for release of the cattle.

We therefore reduce the total amount awarded from Rs. 30 to Rs. 5.

No. 26.

REVISION SIDE. {

THE CROWN,—*Versus*—NADIR,—ACCUSED.

Case No. 99 of 1878.

(PLOWDEN AND ELSMIE, JJ.)

Indian Penal Code, Section 75—Punishment—Transportation for life.
—Under Section 75 of the Indian Penal Code a Court is competent to sentence the accused to transportation for life, or double the amount of punishment to which he would otherwise have been liable.

The accused in this case was sentenced by the Sessions Judge Rawalpindi Division, under Sections 411–75 of the Indian Penal Code, to six years' rigorous imprisonment, Rs. 100 fine, in default one year's further rigorous imprisonment.

The Sessions Judge in his judgment observed, that the accused was the sort of man who ought to be transported for life, but that the full punishment he could get in this case was only six years' imprisonment and fine.

The accused appealed against his conviction to the Chief Court. The appeal was rejected at a preliminary hearing under Section 278, Criminal Procedure Code, by Plowden, J., and the case placed before a Bench on the revision side by the following order:—

“With regard to the Sessions Judge's observations as to the proper sentence, place this case before a Bench on the revision side. The prisoner was liable to transportation for life under Section 75.”

The case came on for hearing before Plowden and Elsmie, JJ. The judgment of the Court was delivered by

14th March 1878. PLOWDEN, J.—It seems to us clear that the Sessions Judge would have sentenced the accused to transportation for life, instead of six years' imprisonment, if the Sessions Judge had not been of opinion that the former punishment could not legally be inflicted. This however is not the case, as Section 75 clearly says that the accused shall be subject to transportation for life or double the amount of punishment to which he would otherwise have been liable.

Having regard to the Sessions Judge's opinion as to the appropriate punishment, and to the fact that the accused is a desperate character, who has once already escaped from jail, where he was under sentence for two offences of house-breaking, we set aside the sentence of imprisonment and substitute for it a sentence of transportation for life.

No. 27.

ALAM' SHAH,—(Complainant),—PETITIONER,

Versus

JEWAN, MUSSAMMAT AMIR BIBI, JAFFIR SHAH AND

QASAM SHAH,—(Accused),—RESPONDENTS.

} REVISION SIDE.

Case No. 671 of 1877.

(PLOWDEN AND ELSMIE, JJ.)

Indian Penal Code, Section 494.—Bigamy—Marriage by wife after absence of husband for four years—Duty of Criminal Court to decide question of marriage.—A Criminal Court is bound to decide the question of marriage when it is essential to the decision of the question whether an offence has been committed or not.

The doctrine of a certain school of Mahomedan divines in regard to the competency of a woman to marry again after the absence of her husband for four years does not entitle a woman so remarrying to the benefit of the exception to Section 494 of the Indian Penal Code.

Petition, under Section 297 of the Criminal Procedure Code, for revision of the order of Sheik Arjamund, Extra Assistant Commissioner and Magistrate 1st Class, Gujrat, discharging the accused.

Protul Chandar Chatterji for Petitioner.

Sutherland for Accused.

The complainant in this case claimed to be the husband of Mussammat Amir Bibi, Accused No. 2, and charged her with having committed bigamy by marrying Accused No. 1 during his (complainant's) lifetime.

It appeared that complainant married Mussammat Amir Bibi 6½ years ago, but that, before the marriage was consummated complainant went away from his home on service. On his return he found that his wife had, during his absence, been married to Accused No. 1 by Accused No. 3, her father; Accused No. 4 having performed the service. These three he charged with abetment of bigamy.

The Magistrate found that the previous marriage of Mussammat Amir Bibi with complainant was established, and also that she married Accused No. 1 when she had no sufficient ground for supposing that complainant was dead, but he discharged the accused on the ground that, according to a certain school of Mahomedan divines, a woman is entitled to marry again if she gets no news of her husband being alive for four years; and referred complainant to the Civil Courts to establish his marriage.

SUTHERLAND, on behalf of the accused referred to Section 79 of the Indian Penal Code.

The judgment of the Chief Court was delivered by

ELSMIE, J.—In discharging the accused persons and referring 25th March 1878. the complainant to a Civil Court to establish the fact of his mar-

riage with Mussammat Amir Bibi, the Magistrate has acted contrary to the spirit of Judicial Circular No. 64, in which it was pointed out that, under the existing law, a Criminal Court has no authority to refuse to decide the question of marriage or no marriage when it is essential to the decision of the question whether an offence has been committed or not.

Further, it appears that the Magistrate, in referring to the doctrines of a certain school of Mahomedan divines in regard to the competency of Mussammat Amir Bibi to marry again after her husband had been absent for four years, has overlooked Section 494, Indian Penal Code, the exception to which shows that such a remarriage could only be entered into with impunity, after the fulfilling of certain conditions and after a continuous absence on the part of the husband for the space of 7 years. We set aside the order discharging the accused persons, and direct that the complaint be enquired into afresh in the Court of the Magistrate of the district, in the exercise of his powers under Section 36, Criminal Procedure Code.

No. 28.

REVISION SIDE. {

THE CROWN,—*Versus*—FOUJDAR.

Case No. 194 of 1878.

(SMYTH AND ELSMIE, JJ.)

Indian Penal Code, Section 447—Criminal Trespass.—Accused for several years cultivated land under a lease from the Forest Department which was renewed annually. During the period of his occupation accused built a dwelling house and made other improvements. The Forest Department requiring the land for conservation. Accused was served with notice of ejectment, and he was told to remove the materials of his house. Accused refused to relinquish the land until payment of compensation for his improvements, whereupon he was criminally prosecuted by the Forest Department, and convicted by the Tahsildar of Kharian of Criminal Trespass under Section 447, Indian Penal Code. *Held*, that the conviction was illegal.

In order to sustain a conviction for criminal trespass it must be shown that the property was in the possession of some other person than the alleged trespasser.

The facts of this case are fully stated in the Judgment of the Chief Court which was delivered by

27th March 1878. SMYTH, J.—This case comes before us as a Court of revision, and the facts, in so far as it is necessary for us to consider them, are briefly these :

The accused Foujdar for several years cultivated 25 ghomaos of land in the Pubbee Rakh, which is the property of Government and under the management of the Forest Department. He held the land under a lease from that Department, and the lease was renewed annually. He paid rent for the land at the rate of Rupees 2-1-0 per ghomao per annum.

During the period of his occupation of the land, Foujdar built a dwelling house and made other improvements at a cost, as he alleges, of Rs. 400. Some orders appear to have been issued recently in the Forest Department for the conservation of the Pubbee Rakh, and notice of ejection was accordingly served on Foujdar, and he was told by the Forest officer to remove the materials of his house. But he refused to relinquish the land until he received compensation for his improvements. On his persisting in this refusal, Criminal proceedings were instituted against him by the Forest Department, and on the facts above stated, he was convicted of criminal trespass by the Tahsildar of Kharian, and sentenced under Section 447, Indian Penal Code to rigorous imprisonment for one month and fine of Rs. 10.

This conviction cannot be sustained. In order to sustain a conviction for criminal trespass, it must be shown that the property was in the possession of some person other than the alleged trespass (Section 441, Indian Penal Code). Here the land was all along in the possession of the accused, and the act charged against him was, not that he entered upon land in the possession of another, nor yet that he remained upon land in the possession of another, but simply that he refused to give up land which was in his own possession, when called upon by the owner to do so. That is not a trespass at all, much less a criminal trespass.

The accused in refusing to vacate the land until he received compensation for the improvements alleged by him to have been made, committed no offence whatever, and we consider that the criminal proceedings taken against him were harsh and ill advised. We set aside the conviction and direct that the fine if it has been realised be refunded to him.

No. 29.

THE CROWN,—*Versus*—DAD GUL, SHER GUL, AND
KALANDER,—(Accused.) } REVISION SIDE.

Case No. 520 of 1878.

(ELSMIE AND BARKLEY, JJ.)

Act XI of 1872—Section 3, Clause 2 and Section 9.—Native State.—Native Indian subjects—Amenability of, to British Courts in respect to offences committed beyond India.—D. G. and S. G., British subjects, crossed the frontier into independent territory and there murdered one K. M. Held that D. G. and S. G. could be tried for murder by the British Courts under Sections 9 and 3, Clause 2, Act XI of 1872. Native Indian subjects of Her Majesty are amenable to the British Courts in respect to offences committed by them in all territories beyond India.

The facts of this case are sufficiently stated in the judgment delivered by

ELSMIE, J.—This case has been reported by the Officiating 18th Sept. 1878. Sessions Judge of Peshawar with his letter No. 831, dated 4th June last.

The files have been called for, and the proceedings have been considered, on the revision side of this Court. According to the Sessions Judge "Dad Gul and others, British subjects, are said to have crossed the frontier into independent territory and there murdered one Khan Mahomed."

The case was committed to the Sessions, but the Judge declined to take it up for want of jurisdiction, with reference to an opinion dated 1st August 1876 by the Officiating Government Advocate, a copy of which has been forwarded. That opinion related to a case on the Lower Frontier, and there was some doubt as to whether the criminals were British subjects or not. But the opinion has been held applicable to the present case, because the Officiating Government Advocate considered that the extradition Act XI of 1872 was not applicable at all to an offence committed in independent territory, whether the offender was a British subject or not. The "opinion" was I believe forwarded by Government to the Commissioner of Peshawar, who invited me, as Additional Commissioner, to express my view upon the point.

I cannot now do better than quote the opinion which I then gave, as I still adhere to it.

"If it be granted that the persons who committed the crime are British subjects, it would seem that Section 9 Act XI of 1872, renders them amenable to our Courts. This section says. 'All British subjects, European and native, in British India may be dealt with, in respect of offences committed by them in any native state, as if such offences had been committed in any place within British India in which any such subject may be or may be found.'

"Now referring to the definition of 'native state' in Section 3 para 2 of the same Act, we find that it 'means in reference to Native Indian subjects of Her Majesty all places without and beyond the Indian territories under the dominion of Her Majesty.' Now surely the Hill country under the independent border tribes would come under the designation of a place without and beyond the Indian territories under the dominion of Her Majesty. If a resident of the Peshawar district crosses the border and commits a murder and returns he can be dealt with under this law."

"In the case quoted in the margin, such a person was sentenced to death and the conviction was supported by the Chief Court. In the judgment the question of jurisdiction was specially considered. I can not therefore understand the Government Advocate's view, when he says that Act XI of 1872 does not apply to such territory, but is merely intended for native states over which the Governor-General claims certain jurisdiction and powers. The two fold definition of native state in Section 3, clause 2 seems to preclude such a view. Native state means in reference to Native subjects all territories beyond India and in reference to European British subjects the dominion of princes and states in India in alliance with Her Majesty."

Crown v. Mazamal. Sessions judgment dated 7th February 1874.

Chief Court judgment, dated 14th April 1874

I may also make the following quotation from the judgment in Mazamals' case. As Sessions Judge I wrote in my judgment:—

“The murdered man and the accused were both British subjects at the time of the assassination. The British Courts have therefore jurisdiction under Section 9, Act XI of 1872.”

Mr. Justice Boulnois wrote thus:—

“And as Mazamal was a British subject and Mosali was a resident of the British village of the Shahgalibala, the fact that this occurred beyond the border near Dublin does not render the offence punishable by British law. The Indian Penal Code applies.”

I think therefore that there can be no doubt that the opinion of the Officiating Government Advocate, in accordance with which the Sessions Judge has declined to take up the present case, is erroneous, and that we ought to set aside the order dated the 15th May last, and direct that the trial of Dad Gul and Sher Gul, who were committed to the Sessions Court Peshawar on a charge of murder, under Section 302, Indian Penal Code, be proceeded with on the ground that, with reference to Sections 9 and 3, Clause 2, Act XI of 1872, Native Indian subjects of Her Majesty are amenable to the British Courts in respect to offences committed by them in all territories beyond India.

BARKLEY, J.—I entirely concur in the proposed order, for *18th Sept. 1878.* the reasons given by my learned colleague.

I would also draw attention to the description of the “extent” of Act XI of 1872 given in Section 1 of that Act, as showing that it was intended to apply to native Indian subjects of Her Majesty in any part of the world not included in the Indian territories under the dominion of Her Majesty. The definition of the words “native state” in Section 3, was evidently framed so as to prevent the use of those words in Sections 8 and 9 limiting the operation which the Act was intended to have.

No. 30.

THE CROWN,—*Versus*—BENI PERSHAD, ACCUSED.

} REVISION SIDE.

Case No. 278 of 1878.

(PLOWDEN AND ELSMIE, JJ.)

Indian Penal Code, section 64—Criminal Procedure Code, section 309—Fine—Alternative imprisonment—Act I of 1868.—*Held* that, imprisonment in default of payment of fine, under section 64, Indian Penal Code, cannot legally be awarded on conviction for an offence punishable under a special Act passed before Act I of 1868.

Held further, that neither section 64, Indian Penal Code, nor section 309, Criminal Procedure Code, renders it imperative to award imprisonment in default of payment of fine.

Case reported by Deputy Commissioner, Lahore, under Section 296, Criminal Procedure Code.

The accused was convicted by Mr. J. A. Robinson, exercising the powers of a Magistrate of the 1st class in the Lahore district, and sentenced by order dated 8th April 1878, under section 48, Act XIV of 1866, to one and a half years' rigorous imprisonment and Rs. 300 fine.

The Magistrate of the district reported the case for revision on the ground that under sections 309 and 539, Criminal Procedure Code (Act X of 1872), the magistrate was bound to award imprisonment in default of payment of the fine inflicted.

The judgment of the Chief Court was delivered by

LOWDEN, J.—The order passed by the magistrate is not *6th May 1878.* illegal. The offence being punishable under a Special Act passed before Act I of 1868, there is no power to award further imprisonment in default of payment of fine under section 64 of the Penal Code. Moreover, that section does not render it imperative to award such imprisonment, nor does section 309 of the Criminal Procedure Code.

We see no sufficient ground for interfering with the Magistrate's order.

No. 31.

THE CROWN—PROSECUTOR,—*Versus*—RANJA,—ACCUSED.

} REVISION SIDE.

Case No. 306 of 1878.

(PLOWDEN AND ELSMIE, JJ.)

Criminal Procedure Code (Act X of 1872) section 310—Whipping—Punishment of, when to be inflicted.—Accused was convicted by the magistrate of the district and sentenced to 7 years' rigorous imprisonment. The Sessions Judge to whom the case was referred for confirmation modified the sentence to one of one year's rigorous imprisonment and "30 stripes to be administered when leaving jail." *Held* that the order of the Sessions Judge directing the whipping to be administered at the time of release was illegal.

Under section 310, Act X of 1872 it is imperative to carry out a sentence of whipping, in addition to imprisonment, immediately on the expiry of 15 days from the date on which it was passed, unless an appeal be made within that time.

Ranja was sentenced by the Magistrate of the Lahore district (exercising powers under section 36, Criminal Procedure Code) to 7 years' rigorous imprisonment.

When the case came before the Sessions Judge for confirmation of sentence, the sentence was modified to one of one year's rigorous imprisonment and "30 stripes to be administered when leaving jail."

The Superintendent Central Jail questioned the legality of that part of the order which prescribed that the punishment of whipping should be inflicted when the prisoner should be about to be released. On a reference through Deputy Commissioner to Sessions Judge, the latter officer did not consider that the limit of 15 days specified in section 310, Criminal Procedure Code, precluded him from making the order for infliction of whipping at time of release.

He held that section 310 "merely prescribes the time at which whipping shall be inflicted when no special date has been fixed by the court. It does not preclude the court from fixing any other date."

The Judgment of the Chief Court was delivered by

16th May 1878.

ELSMIE, J.—We are of opinion that so much of the order of Sessions Judge as directed that the whipping should not be inflicted till the time of the release of the prisoner, was illegal. From the terms of section 310, Criminal Procedure Code, it is imperative to carry out a sentence of whipping in addition to imprisonment immediately on the expiry of 15 days from the date on which it was passed, unless an appeal be made within that time. Should an appeal be preferred, the sentence must be carried out immediately on receipt of the order of the appellate court confirming the sentence. With reference to these remarks we set aside that part of the order of the Sessions Judge which specifies the time for the infliction of the whipping.

No. 32.

ABDUL KARIM,—(Accused),—APPELLANT,

Versus

THE CROWN,—RESPONDENT.

Case No. 224 of 1878.

(SMYTH AND ELSMIE, JJ.)

APPELLATE SIDE. {

Peshawar murder cases.—True charges against the guilty added to by utterly false ones against the innocent.—Element of doubt.—Evidence Act I of 1872, section 3.—Fact when held to be proved.—In dealing with

Peshawar murder cases there may be an element of doubt of a scarcely tangible character, which is often felt when dealing with the evidence of Pathans of the Peshawar district, owing to their proneness to exaggerate and add to true charges against the guilty, utterly false ones against the innocent; but it is not this kind of doubt which should lead a Court to acquit an accused person.

The degree of certainty which must be arrived at before a fact is said to be proved is that described in section 3 of the Evidence Act.

Appeal from order of Sessions Judge, Peshawar Division, dated 27th February 1878.

CHARGE.—*Murder, Section 302, Indian Penal Code.*

Sentence,—transportation for life.

ELSMIE, J.—I have carefully examined the Police papers, the 25th June 1878. magisterial proceedings, and the record of the sessions trial in this case, with the result that I am of opinion that the conviction of, and sentence passed on, Abdul Karim should be sustained and the appeal dismissed. The Sessions Judge has expressed a strong belief that the murdered man Bashir did grapple with his murderer and did recognize him. The positions of the two wounds, one on the back, the other on the chest, tend to strengthen the belief that there was a struggle of some sort between deceased and his assassin or assassins.

The Sessions Judge says that Bashir in his statement recorded before his death said he had seized the murderer who had dealt him the first blow and then received the second on his back from another man. I do not find that deceased made any such precise assertion regarding the second blow. In his deposition before the Tahsildar, which was taken very briefly, he did not even mention the wound on the back. Before the Police he distinctly said he did not know how or from whom he had received the second blow.

It seems to me quite possible that both wounds may have been inflicted by the same person. Deceased may have seized his murderer, who may have swung his arm round and inflicted the stab in the back in order to free himself.

If this was the case, and if, as the Sessions Judge surmises, there was the usual Pathan attempt to accuse as many as possible of the actual murderer's friends, it is not unlikely that in his first statement to the Police, Bashir may have advisedly abstained from saying who inflicted the second blow, lest he should not be supported in this particular by the other witnesses. However that may be, the accused Abdul Karim was charged from the first—his name appears in the first Police report—his *alibi* was discredited by the Sessions Judge and the assessors. Moreover several witnesses have clearly deposed to having identified Abdul Karim either in the Court yard or immediately after he had left it. It is not likely that they are all speaking falsely in this particular. I fully admit that it is possible that the charges and the evidence, against the persons who are said to have accompanied the actual murderer, may be false.

That such false charges and false evidence are daily fabricated amongst the Pathans of the Peshawar valley is matter of full notoriety. In the Criminal trespass case of 1874 in which Bashir the deceased was seized and wounded within Abdul Karim's, the accused's, enclosure, a similar charge, clearly proved to be false, was brought against three relatives or friends of the actual offender. And so here, the addition of the names of Rahim, Channai and Abdul Hak might be accounted for by supposing it to be a *quid pro quo* in return for the false charges against Sadula, Fazl Ahmad and Kabir in 1874. I am of opinion that in this case, which has been sifted to the utmost by the committing Magistrate and the Sessions Judge, we should not regard the possible falseness of the charges and evidence against the father and brothers of accused as sufficient reason for discrediting the evidence against Abdul Karim. In all probability the Sessions Judge was right in thinking the motive of the murder to have been an intrigue between the deceased and the wife of Abdul Karim. There is some evidence, though not much, in support of such a view. It is however thoroughly well known that a Pathan, who is killed on account of an intrigue with a woman, will not ordinarily, even with his dying breath, admit the true cause of his fate. If he did do so he would in fact admit that he had been, according to Pathan ideas, rightly killed, and he would bring *open* disgrace upon his mistress and thereby perhaps bring about her death as well.

A certain corroboration of the belief that the deceased had an intrigue with the wife of accused, is afforded by the fact that he did not appeal against his conviction in the trespass case; very probably under the circumstances he thought he could not be safer than in jail till his enemy's wrath had cooled. But in fact it is not necessary to believe in the alleged intrigue in order to find a sufficient motive for the present murder. Let us take accused's own line. He admits the great enmity between the two families on account of the lambedarship. In the 1874 case he expressly charged deceased with having trespassed in order to kill the old man Rahim. What more likely than that a renewal of the attempt should be anticipated, and that accused may have thought he would do well to prevent it by removing the would-be-assassin.

Mr. Bates has dwelt strongly on the fact that the Commissioner in his judgment has admitted that a sentence of death should not be passed because there was, after all, some element of doubt in the case.

I am clearly of opinion however that there is, under the circumstances, no reasonable doubt of the guilt of accused.

There is doubt of course as to whether he had companions or not, and to this doubt the Sessions Judge seems more particularly to have been referring.

According to my experience, however, there can hardly ever be said to be a case tried by our Peshawar Criminal Courts in which, owing to the extraordinary proneness of Pathans to exaggerate and to add to true charges against the guilty, utterly

false ones against the innocent, some *element* of scarcely tangible doubt does not remain. A judge must convict, however, when he feels that this doubt is in all probability unreasonable, and due to a natural dread of being deceived by persons who belong to one of the most treacherous races of men in the world, and I can well understand an English Judge feeling it almost impossible to pass a sentence of death on a human being, when the evidence before him consists mainly of the statements of Pathans who have manifestly allowed their desire of vengeance to lead them into gross exaggerations of the truth. But if this intangible element of doubt which must probably remain, even in the clearest cases, is to be a sufficient ground for acquittal, the attempt to administer criminal justice according to the existing law might be abandoned altogether as a means of preventing crime.

I find no sufficient ground for interference and, I may observe, that since the conviction of accused his brothers have been tried and convicted by a council of elders of abetment of this murder, not by actually going to the spot, but by conspiring with Abdul Karim to bring about the assassination.

SMYTH, J.—I have carefully considered this case, the more so because the Deputy Inspector of Police and the Extra Assistant Commissioner Mahomed Akbar Khan, who first had charge of it, were disposed to think that the evidence was insufficient for the conviction of the accused. *25th June 1878.*

The Extra Assistant Commissioner, however, was of opinion that Abdul Karim with others was the real culprit, but as the evidence forthcoming was, in his opinion, not such as would support a conviction at a regular trial, he recommended that the case should be made over to a jirga for the severe punishment of the accused.

The Deputy Commissioner was not satisfied that the case had been properly dealt with, and he directed that it should be thoroughly inquired into by a European Magistrate. The enquiry was then taken up by Captain Bartholomew, who committed the accused Abdul Karim and others to the Sessions Court for trial.

The Sessions Judge convicted Abdul Karim, but directed that his co-accused should be brought before a jirga, by whom they have since been convicted of being concerned in the murder.

I consider that the evidence in the case leaves no reasonable doubt that the murder was committed by Abdul Karim, whether alone or in conjunction with others it is unnecessary to determine.

The murdered man lived for 10 days after receiving his wounds. He deposed that when the first wound was inflicted, he recognised Abdul Karim as his assailant and he got up and grappled with him. He took Abdul Karim's name from the first. His statement is corroborated by the evidence of his mother and of a neighbour Fuzli-Ahmad, both of whom are believed by the committing Magistrate and by the Sessions Judge. I see no sufficient reason for disbelieving them.

It is clear that Abdul Karim had an ample motive for committing the murder, and the fact that he and all the male members of his family were absent from his house, as they allege, on the night in question, leaving the females unprotected, is very suspicious.

Mr. Bates has laid stress on the fact that the Commissioner did not impose a capital sentence because there was an element of doubt in the case, and Mr. Bates asks that his client should have the benefit of the doubt. I do not understand however from his judgment that the Commissioner had any real doubt as to the guilt of Abdul Karim. The whole tenor of his judgment goes to show that he fully believed Abdul Karim to be guilty, and he expressly stated that he had no doubt that Abdul Karim was the murderer. It is when coming to consider what sentence he should impose, that the Commissioner speaks of some element of doubt existing. He writes, "The Court while convicting accused, I Abdul Karim, considers there is some element of doubt, and there almost certainly was some other man associated with Abdul Karim, perhaps his brothers. A capital sentence should not be passed."

As I said, I do not gather from this that the Commissioner had any reasonable doubt of Abdul Karim's guilt. There may have been an element of doubt, such as that described by my learned colleague as of a scarcely tangible character, and which is often felt when dealing with the evidence of Pathans of the Peshawar district, but it is not this kind of doubt which should lead a Court to acquit an accused person. It is of course not possible, in cases like the present, to arrive at absolute certainty on the evidence, but a Court does not look for this degree of certainty in all cases. The degree of certainty which must be arrived at before a fact is held to be proved, is that described in section 3 of the Evidence Act where "a fact is said to be proved when, after considering the matters before it, the Court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists."

In my opinion the fact that Abdul Karim murdered Bashir is proved in that sense, by the evidence which we have in the present case.

This appeal is dismissed.

No. 33.

MUSSUMAT FAIZULNISSA,

Versus

FAIZ MAHOMED AND 2 OTHERS.

Case No. 13 of 1878.

(PLOWDEN AND ELSMIE, JJ.)

MISCEL. SIDE.

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Criminal Procedure Code (Act X of 1872) sections 297, 518 and 520—Powers of Revision—Non-Judicial proceeding under section 518. Punjab Courts Act (XVII) of 1877, sections 15 and 25—Chief Court powers of superintendence—Criminal Courts.—Under section 518 Act X of 1872 the Magistrate of the district of Jullundur directed Mussumat Faizulnissa and her mother to remain in the Haveli in which they then were, assuring to them all pre-existing privileges. He further directed that the brothers of M. F. should leave the premises and take up their abode elsewhere, pending the result of an appeal from the decree of the Judicial Assistant declaring the right of M. F. to leave her place of residence and marry without the consent of her brothers, and that a strong Police guard, paid for by the brothers, should keep guard over the outer gate of the Haveli, with directions to permit certain persons to come and go, but under no circumstances to allow the brothers or one M. H. K. the right of entrance.

Held that the Magistrate had no jurisdiction to make the order under section 518, Criminal Procedure Code.

Held further, that section 297, Criminal Procedure Code did not empower the Chief Court to revise the order made under section 518, even though the order was manifestly in excess of the authority of the Magistrate professing to act under that Section. When a Magistrate records a proceeding and issues an order under section 518, intending and professing to act not merely under color of that section, but in an honest though mistaken belief that he has power to act under it, the order made by him is an order made under section 518 within the meaning of section 520, and is therefore not a Judicial proceeding. Such an order does not become a Judicial proceeding and order, because although it is in excess of the Magistrate's authority under section 518 and made without any lawful authority whatever, it is yet a proceeding and order held and made by a Magistrate.

Held further, that the Chief Court had no power, under its powers of general superintendence, under section 25 of Act XVII of 1877, to revise the order of the Magistrate, as that section gave the Court no power of general superintendence over Criminal Courts.

Application under sections 15 and 25 of Act XVII of 1877 to set aside the orders passed by the Magistrate of the district of Jullundur, dated 20th May 1878 and 27th May 1878, under section 518 of Act X of 1872.

Rattigan for Petitioner.

Goldsbury for Respondents.

The facts of this case are fully stated in the judgment of the Chief Court which was delivered by

LOWDEN, J.—The facts of this case may be shortly stated,— 11th July 1878.

Mussumat Faizulnissa a Mohamedan lady of full age, residing with her 3 brothers in the city of Jullundur, brought a suit against them in the Court of the Judicial Assistant at that place for a declaration of her right to leave her place of residence and marry without the consent of her brothers; she obtained a decree declaring her right as above, on May 17th. Between the 17th and 20th of May, a "Nikka" ceremony was performed in virtue of which the lady claims to be the lawful wife of Mahomed Hyat Khan. The validity of this marriage is denied by her brothers.

On the 20th May Mussumat Faizulnissa presented a complaint to the Magistrate of the district against her brothers, charging them, under section 342 of the Penal Code, with wrongful restraint, and also under section 518 of the Criminal Procedure Code.

The application under the Penal Code was dismissed, and the Magistrate proceeded under section 518 to pass on the same day the order now complained of, which has been issued to the lady and to her brothers.

That order, so far as it is material, directs in brief,—‘First that Mussumat Faizulnissa and her mother should remain where they are, having assured to them all pre-existing privileges,—Second that the brothers should forthwith leave the premises and take up their abode elsewhere, until the decision in an appeal from the decree of the Judicial Assistant, and Third, that a strong Police guard, paid for by the brothers, should keep guard over the mahal and outer gateway with directions to permit certain persons to come and go, but under no circumstances to allow the brothers or Mahomed Hyat Khan the right of entrance.’

The petitioner Mussumat Faizulnissa complains of this order, which appears to have been made without her consent, and seeks to have it set aside by this Court in the exercise of its power under section 15 and section 25 of the Punjab Courts’ Act, 1877, on the ground that the order is made without jurisdiction, as section 518 is clearly inapplicable to the circumstances of the case and that it is an undue interference with the liberty of the petitioner who is of full age. Taking the facts as above stated and the findings of the Magistrate in his order of May 20th and 27th (in which the order of the 20th is confirmed and an application to cancel it is rejected) it is plain that the Magistrate had not jurisdiction to make the order complained of.

Indeed the Magistrate’s own record shows that he entertained, at the least, grave doubts as to the legality of his order, but he considered himself morally bound to protect the brothers’ right of appeal against the decree of the Judicial Assistant, reflecting with horror on what would be the state of affairs if that decree were reversed and the Magistrate had permitted consummation of the marriage. It cannot be doubted but that the Magistrate is actuated by high minded and laudable motives in the action he has taken, and his arrangements are probably admirably adapted to the circumstances of the case, and to attain the object he has in view. But in his anxiety to do what appears to him right and expedient, he has either overlooked or ignored the fact that there are limits set by law to the authority, even of a Magistrate of the district, to impose restraints upon the liberty of action which the law is intended to secure and to protect, and that it is his duty to abstain from issuing orders in his Magisterial capacity in excess of the authority conferred upon him by the law. We consider it necessary to point this out, because, in his order of May 27th, the Magistrate plainly intimates that the question of his legal authority is subordinate to his own conception of his duty and of what appears to be just on moral grounds.

The Magistrate’s order being clearly beyond the authority conferred upon him by section 518 of the Criminal Procedure Code, it was objected for the respondent that this Court had no

authority to revise it on the ground that it is not a judicial order, and that neither section 297 of the Code or any other provision of the law empowers this Court to revise an order of this kind.

Construing the plain language of the Act, as we find it, we consider that section 297 of the Code does not empower us to revise an order made under section 518, even if the order be manifestly in excess of the authority of the Magistrate professing to act under that section. When a Magistrate records a proceeding and issues an order under section 518, intending and professing to act not merely under color of that section, but in an honest though mistaken belief that he has power to act under it, we consider that the order made by him is an order made under section 518 within the meaning of section 520 and is therefore not a Judicial proceeding. A Magistrate, of course, cannot merely by recording that he is proceeding under section 518, when he is in truth proceeding under some other provision of the law, alter the true character of his proceeding and convert it from a Judicial into a non-Judicial proceeding, so as to deprive his proceeding of its liability to be revised by this Court.

But we think this is the only limitation which can be placed upon the meaning of section 520, we do not think we are at liberty to say that an order, issued by a Magistrate under section 518, ceases to be an order under that section within the meaning of section 520, because it is apparent on the face of the order that it is one which the Magistrate had no authority to make under that section. Nor can we hold that a proceeding and order of the kind just mentioned, becomes a Judicial proceeding and order, because although it is in excess of the Magistrate's authority under that section, and without any lawful authority whatever, it is yet a proceeding and order held and made by a Magistrate.

The order continues in our opinion to be an order made under section 518 and to be a non-Judicial proceeding.

It follows that as the power of this Court, under section 297, is restricted to revising "material error in Judicial proceedings of Courts subordinate to it," this Court has no power under that section to revise an order made under section 518, though made without lawful authority.

20 W. R. Criminal 53

21 Do. do. 22

22 Do. do. 52

22 Do. do. 24, 78

23 Do. do. 34

24 Do. do. 30

5 All: p. 16

17 of P. R. 1875.

The weight of Judicial authority seems to us in favor of this view, as is shown in the cases cited in the margin. There is one authority to the contrary in the recent case reported at 1 Calc. L. R. p. 58, but the soundness of this ruling appears to us to be open to question in favor of those cited.

It is to be observed that the High Court of Calcutta in the later rulings, above quoted, has held that although it cannot interfere under section 297 of the Code, it can do so in the exercise of its extraordinary jurisdiction under section 15 of the Charter Act (24 and 25 Vic. Chapter 104) which enacts that "each of the High Courts established under it shall have superintendence over all Courts which may be subject to its appellate jurisdiction."

It was contended that this Court has a similar power under section 25 of the Punjab Courts' Act of 1877, that section enacts that,—“ The general superintendence and control over all “ Courts of the seven grades last mentioned in section four and “ over all Courts of Small Causes shall be vested in, and such “ Courts shall be subordinate to, the Chief Court.” But we hold it to be clear that that section gives no power of general superintendence over Criminal Courts, and that the only power vested in this Court of superintending and revising the proceedings of subordinate Criminal Courts is that conferred by section 15 of the Punjab Courts' Act and chapter 22 of the Criminal Procedure Code. It may be that this Court had the power contended for while Act IV of 1866 was in force of which the 44th section was modelled upon the 15th section of the Charter Act, but the Legislature in repealing that Act and enacting Act XVII of 1877 has modified to a considerable extent the power enjoyed by this Court under that section, and has not continued the power therein given of superintendence over subordinate Criminal Courts. Consequently we are of opinion that we have not either under the Punjab Courts' Act of 1877 or the Criminal Procedure Code power, sitting judically as a Court, to set aside an order of the kind before us.

But it does not follow that there is no remedy against an order made without lawful authority under section 518 of the Criminal Procedure Code. If an order warranted by that section be made by a Magistrate not empowered by law to make an order under that section, it is declared to be void by section 34 of the Criminal Procedure Code. If it be made by a competent Magistrate, in excess of the authority conferred by that section, the validity of the order can be tested by disobedience to the order, at the risk of the persons disobeying it.

Further it is open to any person aggrieved by an order passed without jurisdiction under section 518 of the Code to bring the proceedings of the Magistrate to the notice of the Local Government at whose pleasure every Magistrate holds his office.

8 S. W. R., p. 37.
Judicial Commissioner Punjab. Crm. Ruling XCIV.

We make these observations, that it may not be supposed, merely because this Court is not empowered by law to interfere with the non-Judicial proceedings and orders of persons holding the office of Magistrate, that Magistrates are subject to no control in respect of such proceedings and orders when made in excess of their authority, or that a person aggrieved is without any remedy.

Not being competent in the view that we take of our powers to accede to the prayer of this petition by setting aside the order complained of, our order must be that the petitioner's application be rejected.

No. 34.

MUSSUMAT MALALI,—(Accused),—APPELLANT,

Versus

THE CROWN,—(Prosecutor),—RESPONDENT.

} APPELLATE SIDE.

Case No. 375 of 1878.

(PLOWDEN AND ELSMIE, JJ.)

Criminal Procedure Code, (Act X of 1872) sec. 306—Pregnancy of convicted woman—Capital Sentence—Commutation.—Under sec. 306, Act X of 1872, ascertained pregnancy renders it compulsory to postpone the execution of a sentence of death passed upon a woman, and *may* be a reason for commutation by the High Court; but a capital sentence should be pronounced on a conviction for murder, notwithstanding pregnancy, although the execution of the sentence should be deferred.

Appeal from order of Sessions Judge, Derajat, dated 27th April 1878.

The judgment of the Chief Court was delivered by

ELSMIE, J.—This case has already been before us on the appeal of Mohi-ud-din which was dismissed, the sentence of death being confirmed. We see no reason for interfering with the conviction of Mussumat Malali and we dismiss her appeal also, but in doing so we wish to point out that the Sessions Judge is in error, if he is under the impression that the mere uncorroborated allegation of pregnancy was a legal bar to the passing of a capital sentence. *8th August 1878.*

We do not feel quite certain that such was the meaning of the Sessions Judge, but it is clear that he would have awarded the full penalty had he not thought that possibly the woman was pregnant. Section 306, Criminal Procedure Code, shows that ascertained pregnancy shall be a reason for postponing the execution of a sentence of death and *may* be a reason for commutation by the High Court, but it has been ruled by the Calcutta High Court 15 W. R. Cr. 66 that a capital sentence should be pronounced on a conviction for murder notwithstanding pregnancy, although the execution of sentence should be deferred.



No. 35.

THE CROWN,—*Versus*—FAKIR ALI.

} REVISION SIDE.

Case No. 740 of 1877.

(LINDSAY AND PLOWDEN, JJ.)

Criminal Procedure Code (Act X of 1872), Sections 195 and 196—Commitment to Sessions.—Ambiguous finding.—A Magistrate committed a case to the Sessions, recording in his grounds for committal, that the evidence was insufficient, being purely conjectural, but that as the charge was a serious one and there was a certain amount of doubt regarding the innocence of the accused, he committed him to take his trial. *Held* that the Magistrate, holding the views expressed, erred in law in committing the accused to take his trial.

Case referred by Additional Commissioner, Amritsar, under Section 296, Criminal Procedure Code.

This case was committed to the Court of Sessions at Amritsar by Fakir Jamaluddin, Magistrate 1st Class, Amritsar district, on 8th August 1877.

The Additional Commissioner referred the case to the Chief Court, with a view to the commitment being quashed, by the following order :—

“The accused, Fakir Ali, was the *khazanchi* in charge of the *3rd Novr. 1877.*
Toshakhana in Sirdar Bakshish Singh’s house at Raja Sansi in the Amritsar district. There were three locks on the door of the *Toshakhana*, and Fakir Ali had possession of the keys of two of these locks, and Sirdar Thakur Singh, who is manager of the estate for Sirdar Bakshish Singh, who is a minor, kept the key of the third lock. Recently, when the *Toshakhana* was opened and its contents examined, a small box containing valuable jewels was found to be missing.

“The locks of the door presented no appearance of having been tampered with. Fakir Ali was arrested, and charged with the abstraction of the missing box. The preliminary enquiry was made by Fakir Jamaluddin, Extra Assistant Commissioner, who, after recording all the evidence forthcoming, passed an order, on the 21st July 1877, to the effect that there was merely suspicion against the accused, that the suspicion against others was as strong as against Fakir Ali, and that he considered the evidence insufficient; but as the case was a heinous one and triable only by the Sessions Court it should go to the Deputy Commissioner for his opinion. On the 26th July, the Deputy Commissioner, Mr. Gardiner, recorded his opinion that the provisions of Sections 195 and 196, Act X of 1872, should be followed, adding that, if the Extra Assistant Commissioner discharged the accused and the Commissioner considered that he ought not to have been discharged, the latter could order his committal under Section 296 of the Code.

“On receiving back the case with this opinion the Extra Assistant Commissioner, on 8th August, recorded an order to the effect that the evidence was merely conjectural; that the property had

"not been found, and it was not shown that accused had an opportunity of going alone to the *Toshakhana*; that there was merely the fact that the property had been made over to him and he had the keys, but the same might be said of others; that Lal Singh and Kesur Singh, enemies of accused, had access to the house night and day, that therefore the accused ought to be discharged: still, as there was some suspicion against the accused and the case was a serious one, it should be committed to the Sessions. Accordingly, it was committed to the Sessions Court, and has been transferred to me for trial.

"I am doubtful whether the commitment is good in law, and refer the case to the Chief Court with a view to the commitment being quashed, if it is held to be illegal. Section 196 lays down the rule as to when a Magistrate is to make a commitment; it 'is when evidence has been given before him which appears to justify him in sending the accused person to take his trial for an offence,' &c. Now, it is clear that the Magistrate did not consider there was any such evidence in this case,—in fact he was distinctly of opinion that there was not sufficient evidence, and that the accused should be discharged. The reason why he committed the accused was not because there was evidence justifying a commitment, but because the case was a serious one, and there was some ground for suspicion against the accused.

"If the case were an ordinary one, I should proceed with the trial in due course, and (which would probably be the result, as far as I can judge from the evidence before the Magistrate) acquit the accused. But the case is one of some importance, and it is not altogether impossible that further evidence or a clue to the jewels may be hereafter procurable, in which case a conviction of Fakir Ali, if guilty, might be secured. But if he is now tried and acquitted he will be safe from further prosecution, however much evidence may hereafter be procured. In my opinion, the Extra Assistant Commissioner, holding the opinion which he did as to the evidence, acted illegally, as well as inexpediently, in committing the accused, and I think the commitment should be quashed."

The following judgments were delivered

1st Jany. 1878.

LINDSAY, J.—In his grounds for committal the Magistrate writes that there is no sufficient evidence upon which the case should be sent to a Court of Sessions, that the evidence is purely conjectural, but on the ground that the charge is a serious one, and there is a certain amount of doubt regarding the innocence of the accused, he committed him to take his trial. We are of opinion that the Magistrate, holding the views expressed, erred in law in committing the accused to take his trial. The commitment is quashed.

1st Jany. 1878.

FLOWDEN, J.—I concur in quashing the commitment. The finding of the Magistrate is ambiguous; but I think it amounts as much to finding under Section 195 that there are not sufficient grounds for committing the accused person, as a finding under Section 196 that the evidence given appears to justify him in sending him for trial.

No. 36.

WAZIRA,—Versus—DULLA, ACCUSED.

} REVISION SIDE.

Case No. 168 of 1878.

(PLOWDEN AND ELSMIE, JJ.)

Cattle Trespass Act I of 1871, Section 22—Compensation for wrongful seizure—Fine.—Accused was convicted and sentenced under Section 22, Act I of 1871, to pay a fine of Rs. 25, out of which Rs. 12 was ordered to be paid to complainant as compensation for loss and expenses incurred. *Held*, that the imposition of a penalty, in excess of the sum awarded to the complainant as compensation, was illegal.

Case referred by Deputy Commissioner, Sialkot, under Section 296, Criminal Procedure Code.

The accused, on conviction by Sirdar Dyal Singh, Honorary Magistrate, Wadalla, exercising the powers of a Magistrate of the second class in the Sialkot District, was sentenced, by order dated 25th February 1878, under Section 22, Act I of 1871, to a fine of Rs. 25, or in default to 1½ months' rigorous imprisonment, and it was directed that out of the fine, Rs. 12 be paid complainant as compensation for loss and expenses incurred.

The Deputy Commissioner reported the case for revision on the ground that the sentence of fine was illegal, inasmuch as, under Section 22 of the Cattle Trespass Act, only compensation could be awarded to complainant for losses caused by the illegal seizure, including the amount of fines paid by him to the pound authorities for the release of his cattle.

The Chief Court delivered the following

Judgment.—As the Magistrate of the district points out in his 14th March 1878. order of reference, the Honorary Magistrate had no power to impose any penalty on the accused in excess of the sum which he awarded to the complainant as compensation.

We accordingly reduce the fine imposed on accused to Rs. 12, and direct that any thing recovered from the accused in excess of that sum be refunded.

No. 37.

SULTAN AND-2 OTHERS,—(Accused,)—PETITIONERS,

Versus

RUKAN DIN,—(Complainant,)—RESPONDENT.

} REVISION SIDE.

Case No. 265 of 1878.

(PLOWDEN AND ELSMIE, JJ.)

Cattle Trespass Act, I of 1871, Section 22—Compensation—Award of, to complainant—Damage to reputation.—Section 22, Act I of 1871, does not contemplate the award of compensation for damage to the reputation of the complainant, nor does it warrant the infliction of a penalty upon the person complained against, in addition to the compensation awarded.

Petition under Section 297, Act X of 1872, for revision of the order of Mr. Mohanbir, Extra Assistant Commissioner and Magistrate 1st class, Gujranwala District.

The accused, three in number, were convicted under Section 22, Act I of 1871, and by order, dated 30th March 1878, were sentenced to pay a fine of Rs. 5 each, and it was further ordered that the entire amount of the fine should be given to the complainant as compensation.

The accused petitioned the Chief Court to revise the proceedings of the Magistrate.

The Judgement of the Court was delivered by

4th July 1878.

LOWDEN, J.—After enquiring of the complainant, we find that, after allowing him under Section 31 of Act VII of 1870 the costs of the proceedings before the Magistrate, his total loss, inclusive of the fine paid for release of his cattle, does not amount to more than Rs. 6.

The rest he says himself is for "damage to his reputation." Compensation for this is not contemplated by Section 22 of the Cattle Trespass Act, nor does the Section warrant the imposition of a penalty upon the person complained against, in addition to the compensation awarded.

The fine is reduced to Rs. 6, of which each of the defendants will pay Rs. 2.

If the fines have been recovered the excess will be refunded.

CHIEF COURT CIRCULAR ORDERS,
1878.

LIST OF ENGLISH, HINDU, AND MUHAMMADAN HOLIDAYS

to be observed by Civil Courts during the year 1878.

	NAMES OF HOLIDAYS.	Dates on which they fall.	Day of the week.	No. of days.	REMARKS.
E.	New Year's Day ...	1st January ...	Tuesday ...	1	
H.	Lori ...	11th January ...	Friday ...	1	
M.	Muharram ...	6th to 15th January ...	Sunday to Tuesday ...	10	
H.	Basant Panchmi ...	7th February ...	Thursday ...	1	For Lahore only.
M.	Urs Data Ganj Bakhsh ...	23rd February ...	Saturday ...	1	
M.	Akhri Char Shambah ...	27th February ...	Wednesday ...	1	
E.	Ash Wednesday ...	6th March ...	Ditto ...	1	
H.	Sheoratri ...	2nd March ...	Saturday ...	1	
H.	Holi ...	16th to 18th March ...	Saturday to Monday ...	3	
M.	Bara Wafat ...	16th March ...	Saturday ...	1	
E.	Good Friday ...	19th April ...	Friday ...	1	
H.	Baisakhi ...	11th April ...	Thursday ...	1	
H.	Ram Naumi ...	Ditto ...	Ditto ...	1	
H.	Bhadar Kali Mela ...	28th and 29th May ...	Tuesday & Wednesday ...	2	For Lahore only.
E.	Queen's Birth Day ...	24th May ...	Friday ...	1	
H.	Nirjilly Ikadshi ...	11th June ...	Tuesday ...	1	
H.	Beas Puja ...	14th July ...	Sunday ...	1	
H.	Somawati Mawas ...	29th July ...	Monday ...	1	
H.	Nag Panchmi ...	3rd August ...	Saturday ...	1	
H.	Salono ...	12th August ...	Monday ...	1	
M.	Shabrat ...	14th August ...	Wednesday ...	1	
H.	Janam Ashtmi ...	21st August ...	Ditto ...	1	
H.	Anant Choudas ...	10th September ...	Tuesday ...	1	
M.	Jumma Alwada ...	27th September ...	Friday ...	1	
M.	Id-ul-fitr ...	29th & 30th September ...	Sunday and Monday ...	2	
H.	Dasachra ...	2nd to 5th October ...	Wday. to Saturday ...	4	
H.	Diwali ...	25th and 26th October ...	Friday and Saturday ...	2	
H.	Jam Dutia ...	27th October ...	Sunday ...	1	
H.	Deo Uthan ...	5th November ...	Tuesday ...	1	
M.	Id-ul-zuha ...	5th and 6th December ...	Thursday and Friday ...	2	
E.	Christmas ...	25th to 31st December ...	Wday. to Tuesday ...	7	

N. B.—The last Saturday in every month will be a holiday, provided the state of business in the Courts will permit.

Local holidays will be granted for great festivals peculiar to particular places in all districts but Lahore, which is provided for above.

All the days on which a solar eclipse occurs, and the days succeeding each lunar eclipse, will be reckoned as holidays.

All Civil Courts, original and appellate (with the exception of those at the hill stations) will be closed during the month of September.

The Chief Court and the Courts of Additional Commissioners will be closed for civil business from 15th August to 15th October, both days inclusive.

CHIEF COURT CIRCULAR ORDERS.

BOOK CIRCULAR No. $\left\{ \frac{I}{329} \right\}$ OF 1878.

To

ALL JUDICIAL OFFICERS IN THE PUNJAB.

Dated 19th February 1878.

The following Rules, framed under Chapter VI of Act XVII of 1877, and Section 4 of Act XX of 1865, for regulating the qualification, admission, and enrolment of persons to appear, plead, and act in the Courts of the Punjab, and for the control of such persons, are issued by order of the Judges of the Chief Court, in supersession of all previous rules on the subject, with effect from the 1st April 1878.

2. The Chief Court has reserved to itself the power of directing the admission, in special cases, of any person to the Law Classes or the examinations in Law of the Punjab University College.

3. Advocates, Vakils, and Attorneys-at-Law of High Courts of Judicature, heretofore enrolled in the Chief Court, will be deemed to have been enrolled under the rules now promulgated; provided that, in the case of a Vakil or Attorney-at-Law, application is made within 15 days from the date on which these rules come into force to the Chief Court, or to the Commissioner of the Division in which such Vakil or Attorney ordinarily practises, for a practising certificate.

RULES.

I. Any person enrolled as an Advocate of a High Court of Judicature in India shall, on being enrolled as an Advocate in the Chief Court, be entitled to appear, plead and act on behalf of any suitor in any Court of the Punjab in the same manner as, and subject to the rules applicable to, Pleaders of the first grade.

II. An application to be enrolled under Rule I shall be made by petition to the Chief Court, and shall be presented by the applicant in person, or by an Advocate enrolled in the Court.

III. The application will be considered by the Court, and, if it be granted, the Registrar shall cause the applicant's name to be entered in the register of Advocates enrolled in the Chief Court of the Punjab.

IV. Every Advocate enrolled under Rule III shall be entitled to receive from the Registrar a licence, in the form annexed, on payment of a fee of Rs. 16. Such licence shall continue in force without renewal until it shall be cancelled at the Advocate's request, or until the permission thereby accorded shall have been withdrawn, or its operation suspended by order of the Chief Court.

Such order may be made by the Court after such enquiry as the Court shall think fit, and shall be signed by not less than two Judges of the Court.

When the licence granted to an Advocate is cancelled at his own request, or the permission granted by such licence is withdrawn by order of the Court, the Registrar shall cause the Advocate's name to be removed from the register of Advocates.

V. Any person, not enrolled in the Chief Court, who is duly authorized to appear, plead or act on behalf of the Secretary of State for India in Council, the Supreme Government, or Local Government, in a civil proceeding in which such Secretary of State or Government is a party interested, may, with the permission of the Chief Court in which such proceeding is pending, appear, plead or act accordingly.

VI. Any practising Advocate, Vakil, or Attorney-at-Law of a High Court of Judicature, who is not enrolled in the Chief Court, may appear, plead and act in any particular civil proceeding in which he has been engaged by a party interested, with the permission of the Chief Court, or of the Court in which such proceeding is pending: Provided that such permission shall not be given in evasion of the provisions of Rules I and IX.

VII. The permission accorded under Rules V and VI may, for sufficient cause, be withdrawn by order of the Chief Court or the Court in which the proceeding is pending: Provided that the reasons for such order shall be recorded under the hand of the Judge who passes it, and that when the order is passed by a subordinate Court and withdraws a permission granted by the Chief Court, the matter shall be reported to the Chief Court, which will pass thereon such orders as it thinks fit.

Pleaders to be of two grades.

VIII. Pleaders in the Courts of the Punjab, shall be of two grades, that is to say—

- (i.) Pleaders of the first grade, who may appear, plead and act in the Chief Court and all Courts subordinate thereto.
- (ii.) Pleaders of the second grade, who may appear, plead and act in all Courts subordinate to the Chief Court.

IX. The following persons are declared admissible, and shall, with the permission of the Chief Court, and upon proof of good character, be admitted and enrolled as Pleaders of the first grade :—

- (1.) Members of the English or Irish Bar :
- (2.) Members of the Faculty of Advocates in Scotland ;
- (3.) Attorneys of Her Majesty's Superior Courts of Record in England and Ireland, and Writers to the Signet.
- (4.) Members of the Society of Solicitors practising before the Court of Session in Scotland.
- (5.) Vakils or Attorneys-at-Law of any Chartered High Court of Judicature who shall produce certificates that they have actually practised in any such Court for a period of three years at least, and that their names are still borne on the rolls of the Courts: Provided that the Court may, for special reasons, dispense with such certificate.
- (6.) Persons who shall have been admitted and enrolled as Pleaders of the second grade under these rules, or the rules hereby superseded, and shall have practised in the subordinate Courts for the periods noted

below, and who shall continue to be so practising at the time of their applications: Provided that the Chief Court may, on good cause being shown, reduce any of the prescribed periods to such shorter period as the Court may think fit.

Such period shall be—

In the case of persons who can produce certificates of having passed the Honors in Arts Examination of the Punjab University College, or of having obtained the degree of M. A. or B. L. at one of the recognized Universities in British India ... 3 years :

In the case of persons who can produce certificates of having passed the High Proficiency in Arts Examination of the Punjab University College, or of having obtained the degree of B. A. at one of the recognized Universities in British India ... 4 years :

In all other cases ... 5 years :

- (7.) Extra Assistant Commissioners, or Judicial Officers of equal or superior official rank, who have passed the departmental examination prescribed for the higher standard and who have quitted the service of Government: Provided that the application for admission be made within three years of their leaving Government service, and shall be granted subject to such conditions as the Chief Court may impose with regard to the locality in which the applicant shall practise.

A person admitted under this clause will not ordinarily be permitted to practise in any district in which he has served Government unless his official connection with that district has ceased for five years.

X. The following persons are declared admissible, and shall, with the permission of the Chief Court, and upon proof of good character, be admitted and enrolled, as Pleaders of the second grade:—

- (i.) Persons who shall have obtained the degree of Bachelor of Law at one of the recognized Universities in British India.

- (ii.) Persons holding certificates of having passed the final examination in Law under the rules in force for the Law Classes of the Punjab University College :

Provided that the said rules, so far as they relate to admission to the Law Classes and examination therein, have been approved by the Chief Court.

- (iii.) Any Tahsildar, Munsiff, or other Government servant holding an office of such a nature that the officer's duties cannot be efficiently discharged without a competent knowledge of substantive law and the laws of procedure, may, upon quitting office under Government, be admitted by special order to be a Pleader of the second grade without having passed the prescribed examination.

No order of admission will be made under this clause unless the candidate shall have satisfied the Court, either by passing such special examination as the Court may direct, or otherwise, that he is qualified to be a Pleader. No person admitted under this clause can become a Pleader of the first grade until he shall have passed the examination prescribed for Pleaders of the second grade, and shall thereafter have practised for the period prescribed in clause 6 of Rule IX for persons passing such examination.

The provisions of clause 7 of Rule IX apply, *mutatis mutandis*, to all persons seeking admission under this clause.

Mukhtars to be of two grades. XI. Mukhtars in the Courts of the Punjab shall be of two grades—

- (i) Mukhtars of the first grade, who may appear and act in the Chief Court and all Courts subordinate thereto.
- (ii) Mukhtars of the second grade, who may appear and act in all Courts subordinate to the Chief Court.

XII. The following persons are admissible, and, with the permission of the Chief Court, shall be admitted and enrolled, as Mukhtars of the first grade, namely:—

Mukhtars enrolled under the rules heretofore in force, and Mukhtars of the second grade under these rules, who shall have practised regularly for not less than three years in the subordinate Courts, and shall satisfy the Chief Court that they are qualified to appear and act as Mukhtars in the Chief Court.

XIII. The following persons are declared admissible, and shall, with the permission of the Chief Court, and upon proof of good character, be admitted and enrolled, as Mukhtars of the second grade, namely:—

Persons who shall have obtained a certificate of having passed the first examination in Law under the rules in force for the Law Classes of the Punjab University College:

Provided that the said rules, so far as they relate to admission to the Law Classes and examination therein, have been approved by the Chief Court.

XIV. All applications to be admitted and enrolled under the VIIth to the XIIIth (both inclusive) of the foregoing rules, as a Pleader or Mukhtar of either grade shall be made by petition to the Chief Court, and shall be presented by the applicant in person, or by an authorized Pleader of the Court.

The application shall be accompanied by evidence of the qualifications required by the rules, and by a fee of—

Rs. 4, when the application is to be enrolled as a Pleader of either grade.

Rs. 2, when the application is to be enrolled as a Mukhtar of either grade.

The application will be considered by the Judges of the Chief Court, and if it be granted, the Registrar shall cause the name of the applicant to be enrolled in the register of Pleaders and Mukhtars, and shall grant him a certificate on his furnishing the requisite stamp paper and the prescribed declaration in writing.

XV. Applications for renewal of certificates shall likewise be made by petition to the Chief Court, or to the Commissioner of the Division in which the applicant ordinarily practises, at least two weeks before the expiry of the certificate, and shall be accompanied by the expiring certificate and the prescribed declaration in writing.

The application shall be presented in open Court by the applicant in person, or, in the event of the applicant being unable to attend in person, by an authorized Pleader of the Court.

On the requisite stamp paper being supplied, a renewed certificate will be prepared and issued by the Registrar, or the Commissioner of the Division, as the case

may be, to the applicant, if he attend personally, or to the Pleader presenting the petition. When a certificate is renewed by a Commissioner, he should notify such renewal to the Registrar, and forward the superseded certificate for record in the Chief Court Office.

XVI. All Pleaders' and Mukhtars' certificates, whether original or renewed, shall be issued as from the 1st January of the year in which they are taken out.

XVII. As soon as conveniently may be in January of each year, Deputy Commissioners shall satisfy themselves that the Pleaders and Mukhtars ordinarily practising in their districts have renewed their certificates in accordance with the preceding rule, and shall submit, through the Commissioner of the Division, to the Chief Court the names of any Pleaders and Mukhtars shown in the last published list of Pleaders and Mukhtars as practising in their districts who had not renewed their certificates up to the date of report. The names of all such persons will be struck out of the register of practising Pleaders and Mukhtars kept up in the Chief Court Office, and should be posted in the principal court-house of the district in which they formerly practised, with an intimation that they will be liable to penalties if found practising without having renewed their certificates. If any such Pleader or Mukhtar shall subsequently renew his certificate, such renewal shall be reported to the Chief Court in the manner provided in Rule XV.

XVIII. If any person having been admitted and enrolled as a Pleader or Mukhtar shall neglect to take out a certificate, or having obtained a certificate shall fail to renew it for a period of three years, he shall not be entitled to receive a certificate or to have his certificate renewed without a special order of the Chief Court.

XIX. Any person who, having been admitted as a Pleader or Mukhtar, shall accept any appointment under Government, or enter into any trade or other business, shall give notice thereof to the Chief Court, who may thereupon pass such orders as the said Court may think fit.

XX. Any person who shall hold any appointment under Government, or shall carry on any trade or other business at the time of his application for admission as a Pleader or Mukhtar, shall state the fact in his application for admission.

XXI. Except as is provided in the foregoing rules and subject thereto, no person shall appear, plead or act on behalf of any other person in the Civil Courts of the Punjab.

XXII. Except as is otherwise provided in Act XVII of 1877, or in these rules, the provisions of Act XX of 1865 apply to all persons admitted and enrolled in the Chief Court as Pleaders and Mukhtars.

Provided that these rules shall not be deemed to affect the first clause of Section 40 of Act XX of 1865, or Section 35 of the Code of Civil Procedure of 1877, or any notification issued under Section 37 of that Code.

Saving of certain agents recognized by law.

XXIII. If any person practising as a Pleader or Mukhtar of the first grade be

Procedure when a charge of misconduct is brought against a Pleader or Mukhtar of the first grade.

charged in the Chief Court with any misconduct, and the Chief Court consider it necessary to hold an enquiry, under Section 15 of Act XX of 1865, before itself, the Registrar

shall send such Pleader or Mukhtar a copy of the charge, and also a notice that on a day to be therein appointed such charge will be taken into consideration by the Court. Such copy and notice shall be served upon the Pleader or Mukhtar at least seven days before the day so appointed, and on such day, or any subsequent day to which the enquiry may be postponed or adjourned, the Court shall receive all evidence properly tendered by or on behalf of the party preferring the charge, and on behalf of the person charged, and thereafter shall pass orders as the Court shall consider just:

Provided that nothing in this rule shall be deemed to limit the power of the Court to direct, by order of one or more Judges of the Court, in what manner or by what persons any enquiry under Section 15 shall be conducted.

XXIV. An order suspending a Pleader or Mukhtar pending inquiry may be

Who may pass orders of suspension or dismissal.

made by a single Judge of the Chief Court, but no final order by which a Pleader or Mukhtar is suspended or dismissed shall be

made by less than two Judges of the Court.

Form of Advocate's License.

IN THE CHIEF COURT OF THE PUNJAB.

I hereby certify that
has this day been admitted and enrolled as an Advocate in the Chief Court of the Punjab, and is entitled to appear, plead, and act in any Court of the Punjab.

Dated the day of in the year of our Lord 18

BOOK CIRCULAR No. $\left\{ \begin{array}{c} \text{II} \\ \hline 383 \end{array} \right\}$ OF 1878.

To

ALL COMMISSIONERS AND DEPUTY COMMISSIONERS

IN THE PUNJAB.

Dated 26th February 1878.

The expediency of entrusting the execution of all the decrees passed by the superior Courts at the head-quarters of a district to one officer, has been from time to time under the consideration of the Chief Court. In 1868 the Court proposed to introduce the scheme experimentally in one or two districts; but subsequently, doubts having arisen as to the legality of the measure with reference to the provisions of Section 284 of Act VIII of 1859, the proposal was abandoned, and orders were issued prohibiting the practice where it had been introduced.

2. The legal obstacles which have hitherto interfered with the carrying out of the scheme have now been removed by the passing of the new Code of Civil Procedure and Punjab Courts Act, under which Commissioners and Deputy Commissioners have been given full power to arrange for the execution of the decrees of the Courts under their control in such manner as they may think fit.

3. Under these circumstances the Judges desire to again bring the principle to the notice of District Officers, with a view to the scheme being tried at the head-quarters of districts where more than two officers of the head-quarters' staff are employed on civil business. The Judges think that the Treasury Officer would ordinarily be the most suitable officer to select for the duty, he being, at the same time relieved of all other civil business. Where, however, the Treasury Officer has not sufficient judicial experience, some other officer should be selected, as though in executing decrees Civil Courts are not restricted by the same limitations of value as in regular suits, it is undesirable that this important department of civil litigation should be made over to any but officers of proved judicial experience and capacity.

4. These instructions do not apply to decrees passed by Tahsil and Munsiff's Courts, which will, as heretofore, be executed as far as possible by the officers who passed them.

5. The Civil Reports of 1878 should specially notice whether the scheme has been tried in the districts under report, and if so, with what result as regards realizations and the convenience of suitors and the Courts affected.

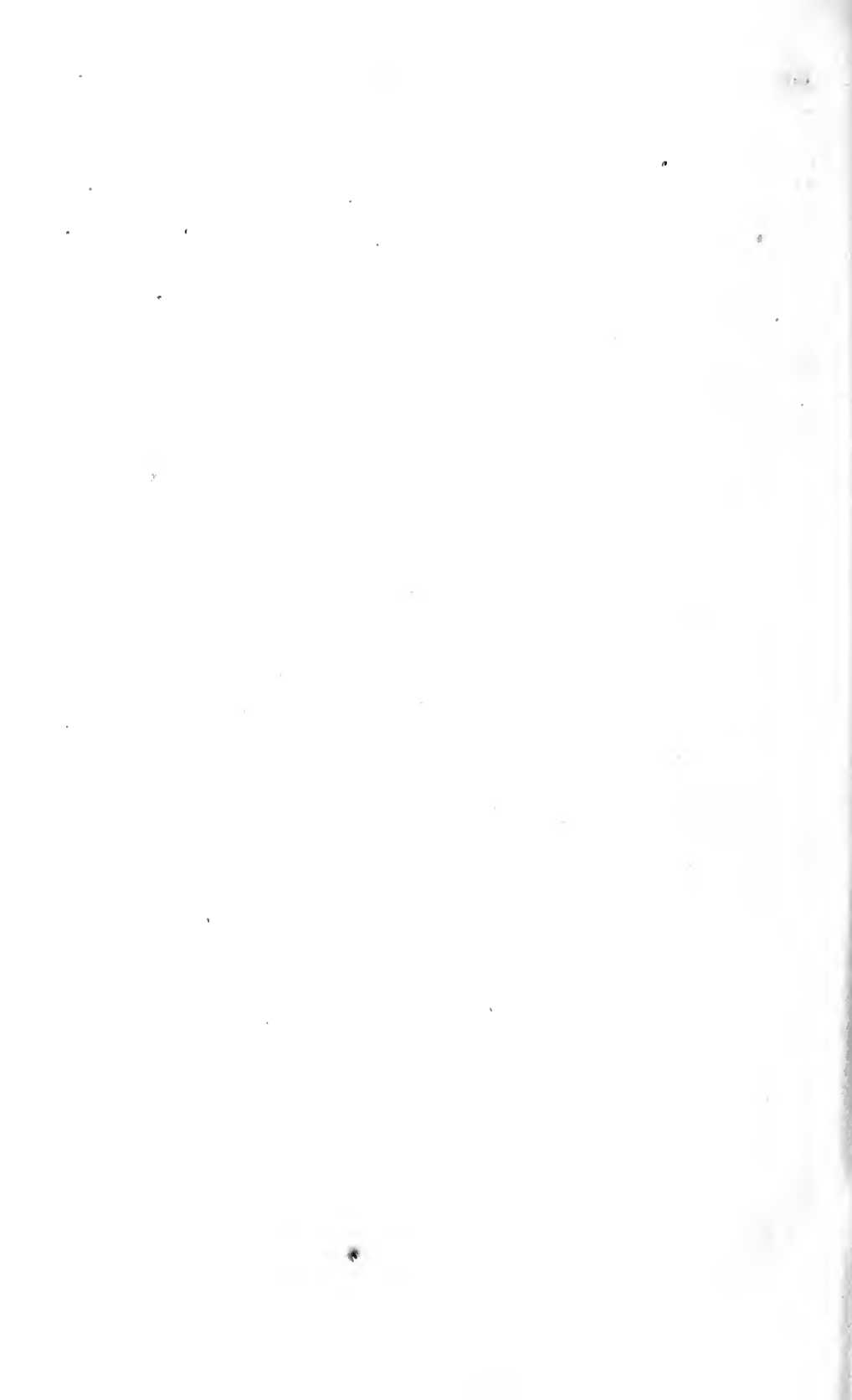
BOOK CIRCULAR No. $\left\{ \frac{\text{III}}{438} \right\}$ OF 1878.

To

ALL JUDICIAL OFFICERS IN THE PUNJAB.

Dated 5th March 1878.

The Chief Court is pleased to direct that the Presiding Officer of every Civil Court subordinate to its authority, under whose orders any Civil prisoner is detained in jail, shall, if the prescribed instalment of the monthly allowance has not been deposited on the last day of each month, forthwith transmit to the Officer in charge of the Jail an order for the release of such prisoner.



BOOK CIRCULAR No. $\left\{ \frac{\text{IV}}{621} \right\}$ OF 1878.

To

ALL CIVIL COURTS OF THE PUNJAB.

Dated 1st April 1878.

At the request of the Punjab Government, and with reference to Sections 411 and 412 of the Civil Procedure Code, the Chief Court directs that whenever a decision is passed in a pauper suit, the Court shall immediately intimate the fact to the Deputy Commissioner, and inform him of the amount payable to Government as stamp dues, as well as the names of the parties by whom such amount is payable, and such other particulars relative to the parties, *viz.*, place of abode, occupation, &c., as will enable the Deputy Commissioner to recover the dues of Government.

2. In cases in which any assets are realized in execution of the decree, the Court should deduct from the first recoveries the sum payable to Government as stamp dues, and should inform the Deputy Commissioner of such deduction, with a view to his making an application to have the sum made over to him for the purpose of being duly credited to Government.

BOOK CIRCULAR No. $\left\{ \frac{\text{V}}{688} \right\}$ OF 1878.

To

ALL JUDGES OF SMALL CAUSE COURTS (AND TO OTHERS WHOM IT MAY CONCERN).

Dated 8th April 1878.

The following Rules for the appointment of Clerks of Small Cause Courts are, with the approval of Government, substituted for those contained in Judicial Circular No. LXXXIII.

2. The only changes of importance are

(a).—A register of accepted candidates will no longer be kept up in this Office.

(b).—The examination required by rule 9 of the superseded rules has been abolished.

RULES.

Judges authorized to appoint with previous sanction of the Chief Court.

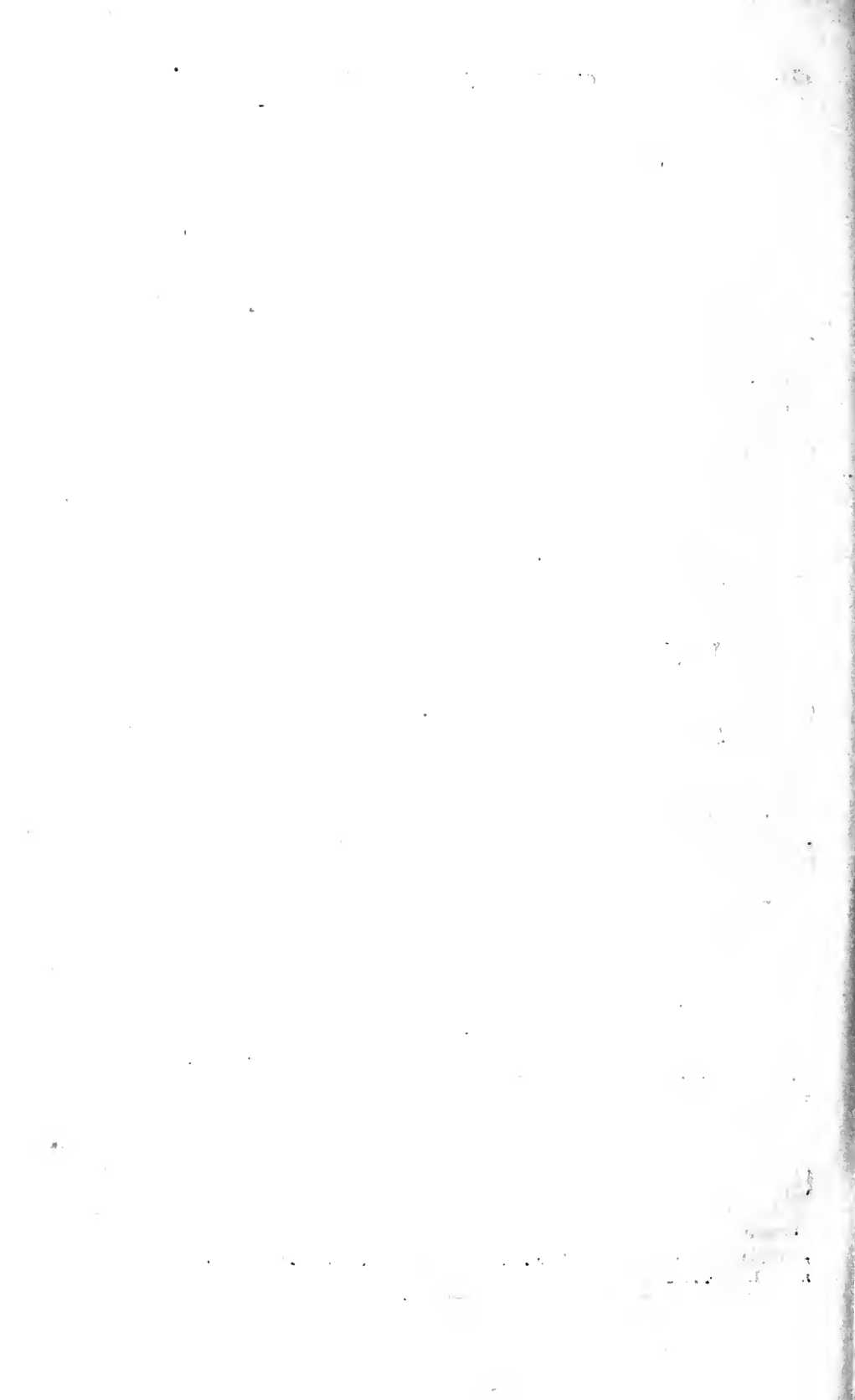
Clerks of Small Cause Courts shall be appointed by the Judge of the Court with the previous sanction of the Chief Court.

2. New appointments must in all cases be made "on probation" till such time (not earlier than three months and not later than one year after appointment) as the Judge of the Small Cause Court is satisfied of the efficiency of the candidate, upon which an application for confirmation will be made to the Chief Court.

Appointments to be first on probation.

3. Every Clerk, whether appointed on probation or permanently, must, on or before taking charge, deposit security to the amount of Rs. 1,000 in cash, Government paper, or in such other form as may be approved by the Chief Court. The security will be forwarded to the Chief Court to be deposited in the Lahore Treasury.

Security.



,BOOK CIRCULAR $\left\{ \frac{\text{VI}}{1023} \right\}$ OF 1878.

To

ALL SESSIONS JUDGES AND MAGISTRATES

IN THE PUNJAB.

Dated 6th May 1878.

In a criminal appeal lately heard by the Court, a very important question was raised as to the manner in which a confession made to a Magistrate acting under the authority of Section 122 of Act X of 1872 should be taken and recorded, and as to the consequences of any error or omission on the part of a Magistrate taking or recording a confession in the exercise of the authority conferred or declared by that section.

2. It is certain that there is room for doubt as to the manner in which a Magistrate acting under the section quoted ought to take and record a confession made to him by an accused person, and as to the consequences of any error or omission on the Magistrate's part.

4. The questions raised were not decided; but if the view of the law contended for is correct, it is certain that the administration of justice in criminal cases will be impeded and delayed, and it is not improbable that occasionally the end to which the administration of justice by Criminal Courts is directed, the punishment of offenders, will not be attained, unless Magistrates be instructed how to proceed, and conform to those instructions.

4. The Court, therefore, as a measure of precaution, and not deciding judicially in what manner a Magistrate in the exercise of the authority conferred or declared under Section 122 should proceed, or what consequences any error or omission on his part might lead to in any subsequent proceedings, considers it expedient to prescribe the following instructions for the guidance of Magistrates exercising that authority, and will require a full explanation from any Magistrate who fails to comply with these instructions, unless the Court considers that such departure, in itself, or in its results, is in the particular case too trivial to demand such explanation.

5. A form for recording confessions is annexed to this Circular, and this form should be invariably used. A supply of the form in English will be issued from this office, and Deputy Commissioners should themselves arrange for a sufficient supply of vernacular forms, for use in all cases in which the confessions are taken down in the vernacular.

I.—Every Magistrate about to record a confession under Section 122 of the Criminal Procedure Code, shall write in the language in which he ordinarily writes his judgments in criminal proceedings, a brief memorandum of the inquiry made by him, and which he is by law bound to make, in order to ascertain that the accused person is acting voluntarily in making a confession.

II.—The statement shall be fully and accurately written down in the language in which it is made by the accused person, and if not written by the Magistrate with his own hand, the Magistrate shall, as the examination proceeds, make a memorandum of it, in the vernacular of the district, or in English with his own hand under his own signature.

III.—The Magistrate shall only question the accused person so far as may be necessary to enable the Magistrate to understand what the accused person's meaning is. Every question put shall be written down in full, together with the answer.

IV.—When the accused person has concluded his statement, the written record of his statement shall be read out or shewn to him by, or in presence of, the Magistrate, and any explanations or additions to it made by the accused person shall be written down in the manner above prescribed.

V.—The Magistrate shall then desire the accused person to add his signature or mark. If the accused person decline to affix his signature or mark, the Magistrate shall state the fact and the reasons, if any, assigned by the accused person, for so declining.

VI.—The Magistrate shall then certify, under his own hand, that the statement of the accused person was made in his presence and hearing, and that the whole of the statement so made has been accurately recorded and attested (if such be the case) by the accused person.

VII.—The Magistrate shall then add the memorandum prescribed by Section 122, and his own signature and description in full.

VIII.—The Magistrate may state in writing any other circumstance attending the making or recording of the accused person's statement. Any such statement made by the Magistrate, if not embodied in the certificate, must be separately signed by him.

IX.—The record will then be forwarded to the Magistrate by whom the case is inquired into or tried.

X.—In every case in which the record of a confession by an accused person taken under Section 122 is received by the Magistrate inquiring into or trying the case, the Magistrate shall enquire from the accused person whether he made the statement purporting to have been made by him before the Magistrate from whom the record of the confession was received. The statement shall be shown or read to the accused person, and the fact noted by the Magistrate; and the accused person's answer to the question shall be recorded in full.

6. Reference to the provisions of Section 80 of the Evidence Act will show the great advantage to be derived in subsequent proceedings, in the form of presumptions, dispensing in the first instance with proof, if Magistrates are careful in observing the directions laid down by law and supplemented by the above instructions.

7. The above instructions apply to all statements of accused persons recorded under the provisions of Section 122 of the Criminal Procedure Code, whether they amount in the opinion of the recording Magistrate to confessions or not.

DISTRICT.

IN THE COURT OF
Crown *Versus*

THE confession of
taken by me
of the
of

District this
187 .

a Magistrate
day

Memorandum of enquiry.

Mark or signature of accused.

(Signed)

Magistrate

Class.

Certified that the above confession was taken in my presence and hearing, and contains accurately the whole of the statement made by the accused [*and was attested by him as correct in my presence.]

*(To be omitted if such be not the case.)

(Signed)

Magistrate

Class.

I believe that this confession was voluntarily made.

(Signed)

Magistrate

Class.

BOOK CIRCULAR No. $\left\{ \frac{\text{VII}}{1614} \right\}$ OF 1878.

To

ALL COMMISSIONERS AND DEPUTY COMMISSIONERS IN
THE PUNJAB.

Dated 4th July 1878.

The Judges of the Chief Court are pleased to direct that, in districts in which the execution of all the decrees passed by the Superior Courts at head-quarters is entrusted to one officer (under the provisions of Book Circular II of 1878), Civil Registers Nos. VIII and IX, heretofore kept separately by each Court for the purpose of registering the progress in the execution of its own decrees, shall be transferred to the Court of the officer to whom alone is entrusted the execution of all Sadr Court decrees.

2. So long as the system recommended in Book Circular II of 1878 shall remain in force in any district, the officer selected to execute all Sadr Court decrees will keep up the Registers (VIII and IX) of each Court separately, and, in the event of the system being temporarily or permanently abandoned, these Registers will be returned to the Courts to which they respectively appertain.

3. When entries are made in these Registers by the officer appointed to execute Sadr Court decrees, the particulars of such entries will be intimated to the Court concerned to enable that Court to fill in the entries required in columns 20 to 27 inclusive of Civil Register No. I.

BOOK CIRCULAR No. $\left\{ \frac{\text{VIII}}{1619} \right\}$ OF 1878.

To

ALL CIVIL COURTS IN THE PUNJAB.

Dated 5th July 1878.

In circulating the accompanying letters from the Judges of the Small Cause Courts of Calcutta and Bombay respectively, the Judges of the Chief Court are pleased to direct that in issuing processes for service in the Presidency Towns, the Presiding Officer in each Court will personally satisfy himself that such full particulars of the description of the person summoned are entered in the process as will render it unlikely that the bailiffs in the Presidency Towns should mistake the identity of the person summoned. In the case of Europeans and Eurasians the Christian name or names, in full if possible, and certainly the initial, the profession or trade, and the full address of the person summoned should be accurately set forth. In the case of Natives, the name, father's name, caste, occupation and address should be recorded in the summons, together with any further particulars which, in the opinion of the Presiding Officer, will facilitate service of the process. The issue of process should be delayed until such particulars are satisfactorily furnished by the person applying therefor.

No. 28 dated 11th May 1878, from the Officiating 5th Judge, Small Cause Court, Calcutta, to the Registrar, Chief Court, Punjab.

I have the honor to acknowledge receipt of your letter No. 1014, dated 4th May last, and to inform you that while the Judges of this Court are anxious to offer every facility for the

service of processes, they cannot, in the protection of their own interests, pledge themselves as a general rule to dispense with the attendance (personally or by agent) of a party to identify the person on whom the process is to be served.

Where the address is complete, or where the notoriety of the person summoned is a guarantee against mistaken identity, the Judges of this Court apprehend no difficulty; but in cases where the address is vague, or where a number of persons of the same name not known to the public live in the same locality, the time of the serving officer would, to the detriment of other business of the Court in a large number of instances, be fruitlessly taken up.

The Judges venture to suggest that if prior to the issuing of the process the party applying is called upon by the Chief Court to afford good and sufficient means of identification, the inconvenience now felt will, in a very great measure, be removed.

No. 862 dated 14th June 1878, from the Clerk of the Small Cause Court, Bombay, to the Registrar, Chief Court, Punjab.

I have the honor to acknowledge the receipt of your letter No. 1015, dated 4th ultimo, to the address of the Judges of this Court, and in reply to inform you that no rule can be laid down respecting the service of processes received from the Mofussil Courts under Section 86 of the Code of Civil Procedure by this Court. If the defendant is well known, or his residence and occupation distinctly given, this Court may not enforce the rule laid down, but will deliver the processes to the bailiffs of this Court with orders to make all endeavours to deliver them to the defendants.

In every case sufficient money should be sent to pay all necessary expenses.

BOOK CIRCULAR No. $\left\{ \frac{\text{IX}}{1640} \right\}$ OF 1878.

To

ALL SESSIONS JUDGES AND MAGISTRATES IN THE PUNJAB.

Dated 6th July 1878.

The Judges of the Chief Court desire to draw the attention of all Criminal Courts to the points raised in the appended extract from the Report of the Indian Jail Conference.

2. In so doing the Judges are not prepared to endorse, as regards sentences passed by Sessions Judges and Magistrates in the Punjab, the opinions therein expressed. But viewing the general importance of the subject raised, and with especial reference to the concluding part of the extract, they consider that the necessity of drawing a distinction between sentences passed on casual offenders and on habitual criminals cannot be too often insisted on or too clearly kept in view.

Extract from the Report of the Indian Jail Conference.

"Para 11. We believe that Magistrates err in their manner of dealing with habitual offenders, partly from judicial timidity and partly because they do not perceive the immense difference which exists between a first and second conviction. In a very large proportion of cases the lesson taught by a first conviction is taken to heart; the sentence may not have been severe, but the ordeal through which the offender has to pass as he goes through the hands of the Police Officer, the Magistrate and the Jailor, terrifies and deters. But let there be one further conviction, and the criminal is at once marked as one of the minority whom the ordinary terrors of the law do not deter, and as one who has given evidence of a disposition to live a life of crime. However light the character of the second offence may be, the re-convicted prisoner ought, we think, to stand in the eye of the Magistrate on a criminal level widely different from that of the offender sentenced for the first time. And the inference against the re-convicted criminal rises in a geometrical ratio with every conviction. But this is not the principle on which re-convicted offenders are dealt with. Whatever may be the cause, the Magistrate's courage does not seem to rise with the boldness of the criminal. As convictions follow one another, he doles out his increased sentences with a timid hand, and by the easy gradations of his sentences positively trains the criminal to endure a jail existence. We could give any number of instances of the inadequate sentences on which we animalvert. All Jail Officers who take any interest in their work could supply some. But we feel that the

matter is one for judicial authorities to deal with, and that we shall have discharged our duty by pointing out this chief weakness in the machinery of our criminal law : still we would venture to express our hope—

- (1.) That steps may be taken to make the police machinery, by which previous convictions are made known to trying officers or courts, more effective : at present it often happens that an old offender is not recognised till he reaches the jail.

- (2.) That it may be enquired whether the sections [quoted in the margin] receive due attention at the hands of judicial authorities, and whether we have or have not good grounds for our belief that offenders convicted more than once are too often quite inadequately

Section 75, Indian Penal Code.
Section 315, Criminal Procedure Code.

punished. We feel that we have some right to make the recommendations, because, as will be seen further on, we propose to divest Jail Officers of the power which they have hitherto frequently exercised of treating persons whom they regarded 'as habituals' with exceptional severity. This practice, which has been encouraged by the orders of many Local Governments, is objectionable on principle, since it ought to be the duty of the Jail Officer to execute, and not to enhance, a sentence. It is further objectionable, inasmuch as few Jail Officers can be supposed to be competent to define the word habitual. It has been too much the custom to count the convictions without regard to the offences in respect of which they were had,"

BOOK CIRCULAR No. $\left\{ \frac{X}{2240} \right\}$ OF 1878.

To

ALL CIVIL COURTS IN THE PUNJAB.

Dated 17th September 1878.

A diversity of practice having been found to obtain in different parts of the Province in the matter of taking and recording receipts for money realized in execution of decree, the Judges of the Chief Court, with a view to secure uniformity of practice in future, are pleased to frame and issue the following rules.

RULES.

1. Sums tendered by a judgment-debtor in payment, or part payment, of a decree shall be received by the Court which framed the decree, or to which the decree has been sent for execution, whether the judgment-creditor shall have sued out execution or not, and whether, in case he shall have sued out execution, he be or be not, actually in attendance at the Court House.

2. If the judgment-creditor be in attendance at the time of such tender (whether for the purpose of prosecuting his execution or not), the money so received by the Court shall be made over to him upon his giving a receipt, duly stamped, if the sum so paid exceed Rs. 20, and the receipt taken shall be filed with the proceedings.

3. If the judgment-creditor be not in attendance, the sum paid in by the judgment-debtor shall be made over by the Court to the sheriff, who will forthwith pay it in to deposit in the Treasury, at the Sadr or Tahsil, as the case may be, and shall notify to the Court the number and date under which the sum has been entered in the deposit register. A corresponding entry will be made in the Court's record.

4. An unstamped acknowledgment will in every case be given to the judgment-debtor by the officer to whom the payment is made for any sum paid into Court under the preceding rules.

5. When the judgment-creditor shall appear and claim the sum received by the Court under rule 3, such Court shall give the claimant (previously identified) a cheque on the treasury, payable to his order, for the amount, and shall note thereon the date of deposit and the number in the deposit register. An unstamped receipt, particularizing the amount of the cheque, its date and number together with the deposit number and date, shall be taken from the judgment-creditor in acknowledgment of such cheque, and this receipt will remain on the file, and will be deemed sufficient to mark the finality of the proceedings.

6. The cheque mentioned in rule 5 shall be presented to the Treasury officer for payment, and the receipt of the payee endorsed thereon shall be sufficient acquittance for the Treasury Officer, who will forward such endorsed cheque to the Accountant-General as his voucher for the withdrawal of the amount from deposit.

7. When the amount exceeds Rs. 20, the receipt endorsed on the cheque will be stamped at the expense of the judgment-creditor.

The above rules do not supersede the provisions of Book Circular No. I of 1877.

BOOK CIRCULAR No. $\left\{ \frac{XI}{2293} \right\}$ OF 1878.

To

ALL CIVIL COURTS IN THE PUNJAB.

Dated 25th September 1878.

THE following rules, relating to the issue of processes to other Provinces, having been substituted by the Chief Court for Part C. of Judicial Circular No. XII, are circulated for general information and guidance.

remitted by a money order, or in postage stamps, for registering the process in the Bombay Small Cause Court Office.

8. In every other case in which application is made for the issue of a process beyond the limits of the Punjab, the stamp requisite for the issue of such process under the rules in force in the Punjab will be levied and affixed to the diary of process fees, and a note will be made on the process to the effect that the proper fee has been levied.

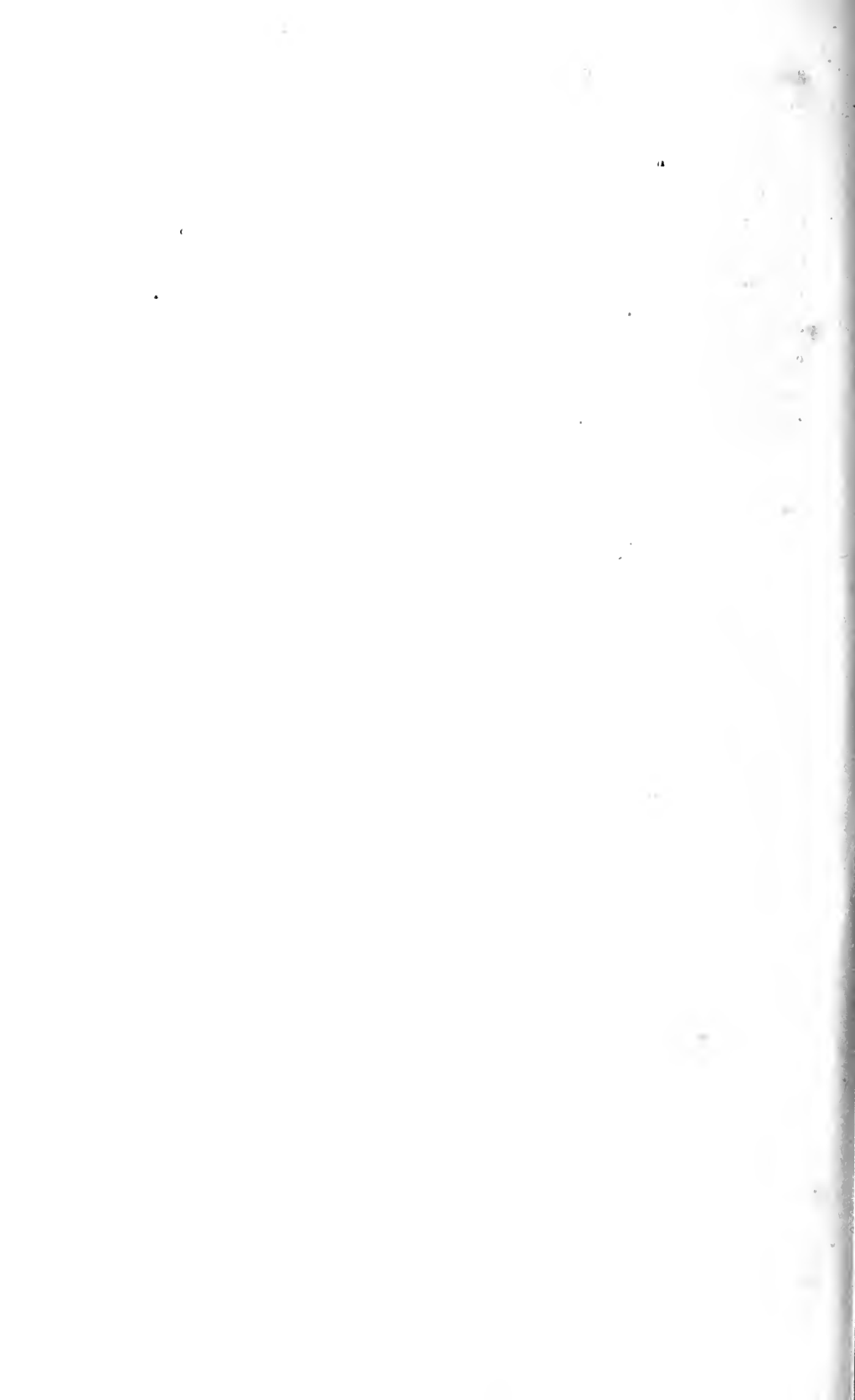
9. In all cases in which the post is made use of, the cost of postage and registration to and fro must be paid by the party liable before the process is forwarded.

No processes are to be sent on Her Majesty's Service which do not relate strictly to the public service.

10. Civil processes for service in the city of Lucknow should be addressed to the Civil Judge and not to the Judicial Commissioner.

11. Processes to be served on persons in Sindh should be transmitted to the Judge of the Sadr Court at Kurachee.

12. All correspondence between Judicial officers in the Punjab and the Courts of another Province should be conducted in the English language. In the case of Native officers, the Deputy Commissioner or one of his Assistants should be the channel of communication.



, BOOK CIRCULAR No. $\left\{ \frac{\text{XII}}{2412} \right\}$ OF 1878.

To

**ALL JUDICIAL OFFICERS IN THE PUNJAB AND OTHER
PERSONS CONCERNED.**

Dated 14th October 1878.

The following Rules, framed under Act XX of 1865, and Chapter VI of Act XVII of 1877, for regulating the qualification, admission and enrolment of persons to appear, plead, and act in the Courts of the Punjab, and for the control of such persons, are issued by order of the Judges of the Chief Court, in supersession of all previous rules on the subject, with effect from the 20th October 1878. The Rules in Part-III have received the sanction of the Local Government.

2. The Chief Court has reserved to itself the power of directing the admission, in special cases, of any person to the Law Classes or the Examinations in Law of the Punjab University College.

3. Book Circular No. I of 1878 is hereby cancelled.

PART I.

Rules to regulate the grant and renewal of Certificates under Act XX of 1865.

I. Application to be admitted and enrolled as a Pleader or Mukhtar under the provisions of Act XX of 1865 shall be made by petition to the Chief Court, and shall be presented by the applicant in person, or by an Advocate, Pleader or Mukhtar practising in the Chief Court, and duly authorized in this behalf.

To be accompanied by evidence of qualifications and the prescribed fee.

II. The application shall be accompanied by evidence of the qualifications required and the fee fixed by the rules, issued under Act XX of 1865, for the time being in force.

III. The application will be considered by the Court, and, if it be granted, the Registrar shall cause the name of the applicant to be enrolled in the Register of Pleaders and Mukhtars, and shall grant him a certificate on his furnishing the requisite stamp paper and the prescribed declaration in writing. Provided that if the certificate be not taken out within the year in which the applicant is admitted, it shall not be issued without a special order of the Court.

IV. Applications for renewal of certificates shall likewise be made by petition to the Chief Court, or to the Commissioner of the Division in which the applicant ordinarily practises, at least two weeks before the expiry of the certificate, and shall be accompanied by the expiring certificate and the prescribed declaration in writing.

The application shall be presented in open Court by the applicant in person, or, in the event of the applicant being unable to attend in person, by an Advocate, Pleader or Mukhtar practising in the Court and duly authorized in that behalf.

On the requisite stamp paper being supplied, a renewed certificate will be prepared and issued by the Registrar, or the Commissioner of the Division, as the case may be, to the applicant, if he attend personally, or to the Advocate, Pleader or Mukhtar presenting the petition. When a certificate is renewed by a Commissioner, he should notify such renewal to the Registrar, and forward the superseded certificate for record in the Chief Court Office.

Certificates to issue as from 1st January of the year in which they are taken out.

V. All Pleaders' and Mukhtars' certificates, whether original or renewed, shall be issued as from the 1st January of the year in which they are taken out.

VI. As soon as conveniently may be, in January of each year, Deputy Commissioners shall satisfy themselves that the Pleaders and Mukhtars ordinarily practising in their districts have renewed their certificates in accordance with the preceding rules, and shall submit, through the Commissioner of the Division, to the Chief Court, the names of any Pleaders and Mukhtars shown in the last published list of Pleaders and Mukhtars as practising in their districts who had not renewed their certificates up to the date of report. The names of all such persons will be struck out of the register of practising Pleaders and Mukhtars kept up in the Chief Court Office, and should be posted in the principal Court-house of the district in which they for-

Yearly return to be submitted of unrenewed certificates.

merly practised, with an intimation that they will be liable to penalties if found practising without having renewed their certificates. If any such Pleader or Mukhtár shall subsequently renew his certificate, such renewal shall be reported to the Chief Court in the manner provided in Rule IV.

VII. After receipt of the yearly returns-prescribed in the last paragraph, a list will be compiled in the Chief Court of all persons whose names continue to be borne on the register of Pleaders and Mukhtárs enrolled under Act XX of 1865, and on the register of Advocates and others permitted to practise under Act XVII of 1877. Printed copies of this list will be furnished by the Register to all District Courts in the Punjab.

PART II.

Rules under Chapter VI of Act XVII of 1877, and all other powers enabling the Court in this behalf.

I. No Advocate, Vakíl or Attorney-at-Law of any High Court of Judicature is entitled to appear, plead or act on behalf of any suitor in any Civil Court in the Punjab, unless with the permission of the Chief Court, granted in conformity with the following rules:—

General permission and special permission.

or Attorney-at-Law is retained by a party thereto.

Special permission is permission to appear, plead or act in a particular suit or proceeding in the Civil Court in which such proceeding may, for the time being, be pending.

III. Any Advocate, Vakíl or Attorney-at-Law of any High Court of Judicature, who was practising in the Civil Courts of the Punjab, and whose name was registered in the Chief Court at the date of the passing of Act XVII of 1877, shall, if he apply by petition to the Court, within 30 days from the date when these rules come into force, be supplied by the Registrar of the Court with a license, in the form annexed to these rules, granting him general permission to practise in the Chief Court and in any Civil Court subordinate to the Chief Court.

License.

The benefit of this rule may, for sufficient reasons, be extended by special order of the Court to persons who regularly practised in the Civil Courts of the Punjab, but whose names had not been registered in the Chief Court at the date of the passing of Act XVII of 1877.

IV. An application for such general permission made by any such Advocate, Vakíl or Attorney after the period prescribed shall be laid before the Court for orders, and be disposed of accordingly.

V. Any practising Advocate of a High Court may apply for general permission to practise in the Chief Court and the Subordinate Civil Courts of the Punjab, by petition, which shall be presented by the applicant in person or by an Advocate practising in the Chief Court.

VI. The application shall be signed by the applicant, and shall be accompanied by documentary evidence that his name is borne, at the date of application, on the rolls of one of the High Courts of Judicature in India.

VII. The application will be considered by the Court, and, if it be granted, the Registrar will supply to the applicant a license in the form annexed to these rules.

VIII. The names of all persons to whom licenses are granted under the foregoing rules will be entered in a book entitled, "Register of Advocates and others, entitled to practise in the Civil Courts of the Punjab under Act XVII of 1877."

IX. A license granted under the foregoing rules will continue in force without renewal until it shall be cancelled at the request of the licensee, or until the permission thereby accorded shall have been withdrawn, or its operation suspended, by order of the Chief Court.

X. The operation of a license may be suspended, pending enquiry or until further orders of the Chief Court, by an order made for sufficient cause by a single judge of the Court.

An order for the withdrawal or suspension of the operation of a license, otherwise than pending enquiry or until further orders of the Court, may be made after such notice to the person concerned and such enquiry as the Court shall think fit, and shall be signed by not less than two judges of the Court.

XI. When a license is cancelled at the request of the person licensed, or the permission given thereby is withdrawn by order of the Court, the Registrar shall cause the name of such person to be removed from the register above mentioned,

Effect of order suspending or withdrawing license.

XII. The four preceding rules apply to persons, other than Pleaders admitted and enrolled under Act XX of 1865, and not being Advocates, Vakils or Attorneys-at-Law, who were admitted or licensed to be Pleaders of the Chief Court under the provisions of Section 10, Act IV of 1866 only.

XIII. Any practising Advocate, Vakil or Attorney-at-Law, not licensed under the foregoing rules, who desires to appear, plead or act on behalf of a suitor in a particular civil suit or proceeding in a Civil Court subordinate to the Chief Court, may apply to the Court in which the proceeding is pending for such permission.

XIV. The application shall be by petition. It shall state the names of the parties to the cause, the Court in which it is pending, and the person or persons for whom the applicant is retained, and shall be signed by the applicant with the addition of his professional title. It shall be presented by the applicant in person, or by some person authorized to practise in the Court to which it is presented, or by the suitor by whom the applicant is retained.

XV. Special permission shall not be granted in any case where the Court has reason to believe that the applicant exercises his profession in the Civil Courts of the Punjab so frequently that he ought, if an Advocate, to apply for a license under these rules, or, if a Vakil or Attorney, for admission and enrolment as a Pleader under the rules for the time being in force under Act XX of 1865.

XVI. If the application be refused, an order stating the grounds of refusal shall be recorded under the hand of the judge.

XVII. When permission is granted, it shall be in the form of an order on the petition signed by the judge, and the petition shall be filed with the record of the proceeding to which it relates.

XVIII. Special permission granted under these rules is revocable by the Court in which the proceeding may, for the time being, be pending, and may for sufficient cause be revoked by an order of the Court, in which order the grounds for revocation shall be stated under the judge's hand.

XIX. Any order refusing to grant, or revoking, special permission shall be liable to be revised by the Chief Court upon application made by, or on behalf of the applicant by petition to the Court for that purpose, and may be set aside by order of a single judge of the Court.

XX. A certified copy of any such order shall be forwarded to the Court in which the proceeding is pending, and shall be filed with the record.

XXI. When the proceeding is one pending in the Chief Court, the application shall conform to the provisions of rule 14, and the requisite permission may be granted by an order of the judge, or any of the judges, before whom the proceeding is, for the time being, pending; and may be in like manner revoked.

SCHEDULE.

Form referred to in Rules 3 and 7.

License under Section 43 of the Punjab Courts' Act, 1877.

IN THE CHIEF COURT OF THE PUNJAB.

Certified that A. B., Advocate (or as the case may be), of the High Court of Judicature of the North-Western Provinces (or as the case may be), has this day been enrolled in the Chief Court of the Punjab, and is hereby permitted to practise in the Chief Court and in any Civil Court of the Punjab.

Given this day }
of 187 at }
 Lahore }

C. D.,
Registrar.

PART III.

Rules under Section 4 of Act XX of 1865, for the qualification, admission and enrolment of proper persons to be Pleaders and Mukhtars of the Courts of the Punjab, the fees to be paid for the enrolment of such persons, and for the suspension and dismissal of Pleaders and Mukhtars so admitted and enrolled.

I. Pleaders in the Courts of the Punjab shall be of two grades, that is to say—

(i.)—Pleaders of the first grade, who may appear, plead and act in the Chief Court and all Courts subordinate thereto.

(ii.)—Pleaders of the second grade, who may appear, plead and act in all Courts subordinate to the Chief Court.

Persons who are admissible to be Pleaders of the first grade.

II. The following persons are declared admissible, and shall, with the permission of the Chief Court, and upon proof of good character, be admitted and enrolled as Pleaders of the first grade :—

- (1).—Members of the English or Irish Bar.
- (2).—Members of the Faculty of Advocates in Scotland.
- (3).—Attorneys of Her Majesty's Superior Courts of Record in England and Ireland, and Writers to the Signet.
- (4).—Members of the Society of Solicitors practising before the Court of Session in Scotland.
- (5).—Vakils or Attorneys-at-Law of any chartered High Court of Judicature who shall produce certificates that they have actually practised in any such Court for a period of three years at least, and that their names are still borne on the rolls of the Court : Provided that the Court may, for special reasons, dispense with such certificate.
- (6).—Persons licensed to act as Pleaders in the Chief Court under Section 10 of Act IV. of 1866, whose names were borne in the Chief Court Register of Pleaders on October 17th, 1877.
- (7).—Persons who shall have been admitted and enrolled as Pleaders of the second grade under these rules, or the rules of 19th May 1874, and shall have practised in the Subordinate Courts for the periods noted below, and who shall continue to be so practising at the time of their applications : Provided that the Chief Court may, on good cause being shown, reduce any of the prescribed periods to such shorter period as the Court may think fit.

Such period shall be—

In the case of persons who can produce certificates of having passed the Honors in Arts Examination of the Punjab University College, or of having obtained the degree of M. A. or B. L. at one of the recognized Universities in British India,—3 years :

In the case of persons who can produce certificates of having passed the High Proficiency in Arts Examination of the Punjab University College, or of having obtained the degree of B. A. at one of the recognized Universities in British India,—4 years :

In all other cases,—5 years :

- (8).—Extra Assistant Commissioners or Judicial Officers of equal or superior official rank, who have passed the departmental examination prescribed for the higher standard, and who have quitted the service of Government : Provided that the application for admission be made within three years of their leaving Government service, and shall be granted subject to such conditions as the Chief Court may impose with regard to the locality in which the applicant shall practise. A person admitted under this clause will not ordinarily be permitted to practise in any district in which he has served Government, unless his official connection with that district has ceased for five years.

Persons who are admissible to be Pleaders of the second grade. III. The following persons are declared admissible, and shall, with the permission of the Chief Court, and upon proof of good character, be admitted and enrolled as Pleaders of the 2nd grade :—

- (i).—Persons who shall have obtained the degree of Bachelor of Law at one of the recognized Universities in British India.
- (ii).—Persons holding certificates of having passed the final examination in law under the rules in force for the Law Classes of the Punjab University College : Provided that the said rules, so far as they relate to admission to the Law Classes and examination therein, have been approved by the Chief Court.
- (iii).—Any Tahsildar, Munsiff or other Government servant holding an office of such a nature that the officer's duties cannot be efficiently discharged without a competent knowledge of substantive law and the laws of procedure, may, upon quitting office under Government, be admitted by special order to be a Pleader of the second grade without having passed the prescribed examination.

No order of admission will be made under this clause unless the candidate shall have satisfied the Court, either by passing such special examination as the Court may direct or otherwise, that he is qualified to be a Pleader. No person admitted under this clause can become a Pleader of the first grade until he shall have passed the examination prescribed for Pleaders of the second grade, and shall thereafter have practised for the period prescribed in clause 7 of Rule II, for persons passing such examination.

The provisions of clause 8 Rule II, apply, *mutatis mutandis*, to all persons seeking admission under this clause.

Mukhtars in the Courts of the Punjab shall be of two grades.—

- (i).—Mukhtars of the first grade, who may appear and act in the Chief Court and all Courts subordinate thereto,

(ii).—Mukhtars of the second, grade who may appear and act in all Courts subordinate to the Chief Court.

Persons who are admissible to be Mukhtars of the first grade.

V. The following persons are admissible, and, with the permission of the Chief Court, shall be admitted and enrolled as Mukhtars of the first grade, namely :—

Mukhtars enrolled under the rules heretofore in force, and Mukhtars of the second grade under these rules, who shall have practised regularly for not less than three years in the Subordinate Courts, and shall satisfy the Chief Court that they are qualified to appear and act as Mukhtars in the Chief Court.

VI. The following persons are declared admissible, and shall, with the permission of the Chief Court, and upon proof of good character, be admitted and enrolled as Mukhtars of the second grade, namely :—

Persons who shall have obtained a certificate of having passed the first examination in Law under the rules in force for the Law Classes of the Punjab University College : Provided that the said rules, so far as they relate to admission to the Law Classes and examination therein, have been approved by the Chief Court.

Enrolment under Section 7 in Chief Court.

VII. A fee shall be payable by every person admitted by the Chief Court to be a Pleader or Mukhtár under the foregoing rules according to the following scale :—

By a Pleader of either grade,—Rs. 4.

By a Mukhtár of either grade,—Rs. 2.

Enrolment under Section 12 of any Pleader or Mukhtár in any Court subordinate to Chief Court.

VIII. An enrolment fee of half the above amount shall be payable by any Pleader or Mukhtár applying to be enrolled under Section 12 of Act XX of 1865 in any Court subordinate to the Chief Court.

IX. If any person, having been admitted and enrolled as a Pleader or Mukhtár of either grade, shall neglect to take out a certificate, or, having obtained a certificate, shall fail to renew it for a period of three years, he shall be suspended, and shall not be entitled to receive a certificate or to have his certificate renewed without further orders of the Chief Court.

Pleader or Mukhtár failing to take out or renew certificate for three years.

X. Any person who, having been admitted as Pleader or Mukhtár of either grade, shall accept any appointment under Government, or shall enter into any trade or other business, shall give notice thereof to the Chief Court, who may thereupon suspend such Pleader or Mukhtár from practice, or pass such orders as the said Court may think fit.

Notice to be given to Chief Court if Pleader or Mukhtár accepts a Government appointment, &c.

XI. Any person who shall hold any appointment under Government, or shall carry on any trade or other business at the time of his application for admission as a Pleader or Mukhtár of either grade, shall state the fact in his application for admission, and the Chief Court may refuse to admit such person, or pass such orders thereon as it thinks proper.

Application for admission to state certain particulars.

Willful violation of foregoing rules to subject a Pleader or Mukhtár to suspension or dismissal.

XII. Any willful violation of any of the above rules shall subject a Pleader or Mukhtár of either grade to suspension or dismissal.

XIII. If any person practising as a Pleader or Mukhtár of the first grade be charged in the Chief Court with any misconduct, and the Chief Court consider it necessary to hold an enquiry, under Section 15 of Act XX of 1865, before itself, the Registrar shall send such Pleader or Mukhtár a copy of the charge, and also a notice intimating that on a day to be therein appointed, such charge will be taken into consideration by the Chief Court. Such copy and notice shall be served upon the Pleader or Mukhtár, at least ten days before the day so appointed, and on such day, or any subsequent day to which the enquiry may be postponed or adjourned, the Court shall receive all evidence properly tendered by or on behalf of the party preferring the charge, and by the Pleader or Mukhtár, and thereafter shall pass such orders as the Court shall consider just : Provided that nothing in this rule shall be deemed to limit the power of the Court to direct, by order of one or more judges of the Court, in what manner or by what persons any enquiry under Section 15 shall be conducted.

XIV. An order suspending a Pleader or Mukhtár of either grade, pending inquiry, may be made by a single judge of the Chief Court, but no final order by which a Pleader or Mukhtár of either grade is suspended or dismissed shall be made by less than two judges of the Court.

Who may pass orders of suspension or dismissal.

BOOK CIRCULAR No. $\left\{ \frac{\text{XIII}}{2433} \right\}$ OF 1878.

To

ALL CRIMINAL COURTS IN THE PUNJAB.

Dated 15th October 1878.

The Judges of the Chief Court have observed that it is the almost universal practice in all Criminal Courts to take down examinations of accused persons in what passes for Urdu, instead of in the language in which they are given.

2. Comparing the provisions of the two parts of Chapter XXV of the Code of Criminal Procedure, and especially sections 334 and 335 with section 346, it seems clear that the Code contemplates the statement of an accused person being, whenever practicable, recorded in the language in which it is given, and not in the language in ordinary use in the district in which the Court is held (as determined by the Local Government under section 337), or in English, or in the vernacular language of the Sessions Judge or Magistrate, when such language is not identical with the language in ordinary use.

3. The Court accordingly considers it expedient to issue the following instructions for the guidance of the Criminal Courts subordinate to its authority:—

a.—Statements of accused persons recorded under sections 346 and 122 of the Criminal Procedure Code, must, whenever practicable, be recorded in the language in which they are made.

b.—When such language is not the language in ordinary use in the district in which the Court is held, as determined by the Local Government under section 337, Criminal Procedure Code, or the language prescribed by an order under section 335, Criminal Procedure Code, the record of the statement must in all appealable cases be translated into the language of the district, or into English, where the Sessions Judge or Magistrate ordinarily writes his proceedings in English, and such translations must be authenticated by the signature of the translator, and also of the Judge or Magistrate before whom the statement is made.

BOOK CIRCULAR No. $\left\{ \frac{\text{XIV}}{2475} \right\}$ OF 1878.

To

ALL CIVIL COURTS IN THE PUNJAB.

Dated 19th October 1878.

It has been brought to the notice of the Chief Court that the rules contained in part b of Judicial Circular No. XII, for the levy of uniform postage charges in all civil suits and appeals, in which processes have to be sent by post for service to a different district of the Punjab from that in which the suit or appeal is pending, are not in strict accord with the provisions of section 95 of the Civil Procedure Code, which contemplate payment of the actual cost of postage and registration for each process by the person at whose instance the process is issued.

2. The Court accordingly directs that the system at present in force shall not be continued beyond the end of the present year. From January 1st, 1879,

in all civil suits and appeals in which processes are sent by post for service to a different district of the Punjab from that in which the case is pending, the actual cost of postage and registration to and fro must, in accordance with section 95 of the Civil Procedure Code, be paid by the party liable before the process is forwarded.

BOOK CIRCULAR No. $\left\{ \frac{XV}{2537} \right\}$ OF 1878.

To

ALL CIVIL COURTS IN THE PUNJAB.

Dated 24th October 1878.

It has been brought to the notice of the Chief Court that disputes frequently arise as to whether possession of immoveable property has in fact passed in execution proceedings, and that information is seldom to be found on the record which would assist in the determination of such disputes.

2. It may be proved that at the time of execution the property was in the possession or occupancy of some person not a party to the decree, and that he remained in possession, but there is nothing to show that such person was made aware of what was done in execution, and consented to hold as a tenant of the person to whom possession was ordered to be delivered. On reference to the execution proceedings, all that is found is an endorsement upon the warrant that it has been carried out, and an acknowledgment by the decree-holder that he has received possession, which in such cases often turns out to have been given *pro forma*, under the idea that the completion of the proceedings entitles him thereafter to deal with the property as his own, and to treat any person in possession either as his tenant, or as a wrong-doer. Either the endorsement or this acknowledgment may be wanting, but if both are present, there is still nothing to show how the execution was carried out.

3. The provisions of the present Code of Civil Procedure upon the subject are precise, and, if carried out, would remove the evils complained of. But it is to be feared that in many courts they are disregarded, the old routine being followed, without any reference to what the law requires.

4. In all cases in which a warrant has been issued for the execution of a decree, section 251 requires the proper officer, to whom it has been delivered to be executed, to endorse thereon the day and manner in which it was executed. It is not sufficient, therefore, for him to state that it has been carried out. He must state clearly what steps have been taken to give it effect.

5. In the case of the delivery of immoveable property, sections 263 and 264 state what these steps should be.

First, if it is in the possession of any person bound by the decree, such person may be called upon to vacate the property, in order that possession may be delivered to the person to whom it has been adjudged, or his agent, and if he refuses to do so, he may be removed from the property in order to such delivery of possession. Here the endorsement would state, that the property was found in the possession of A (naming the person), that he was one of the persons bound by the decree, or held on behalf of one of those persons (naming the person), that he was required to vacate the property, and that on his doing so, the person entitled under

the decree was put in possession, or that, on his refusal to do so, he was removed from the property, and the person entitled under the decree was put in possession.

Secondly, if the property is in the occupancy of a tenant or other person entitled to occupy it, and the occupant be found, a notice in writing, containing the substance of the decree, is to be served upon him, and the endorsement on the warrant should state that this has been done. If he cannot be found, copy of the warrant must be affixed in some conspicuous place on the property, and proclamation made as provided in section 264. Here the endorsement should state that the occupant could not be found, that a copy of warrant had been put up (stating where it was affixed), and that the substance of the decree had been proclaimed.

6. Before issuing a warrant for the delivery of immoveable property, the Court should ascertain from the decree-holder, or his agent, who was believed to be in possession, to guide it in ordering which mode of delivery should be adopted.

7. The delivery of possession of immoveable property sold in execution of decree is provided for by sections 318 and 319, which are very similar to sections 263 and 264. Such delivery may be applied for by the purchaser after he has obtained the certificate declaring the sale absolute, and not merely the judgment-debtor, or any person holding on his behalf, but any person claiming the property under a title created by him subsequently to the attachment, may be required to vacate the property, and may be removed if he refuses to do so. It is equally necessary in this case, as in that of the delivery of the property, possession of which has been decreed, that the endorsement on the warrant should state exactly what has been done.

8. When the property sold is in the occupancy of a tenant or other person entitled to occupy the same, a copy of the certificate of sale must be affixed in some conspicuous place on the property, and proclamation must be made as provided by section 319. There is no provision for substituting for this procedure a written notice to the tenant.

9. If any person not bound by the decree should be dispossessed of any property in execution of decree, he may apply to the Court executing the decree under section 332, if he disputes the right of the decree-holder to be put in possession, and if, upon examining him, the Court finds that there is probable cause for making the application, it should proceed to investigate the matter in the same manner as if a suit had been instituted by the applicant against the decree-holder under section 9 of the Specific Relief Act, 1877. Attention is drawn to this provision, as the Judges understand that in such cases it is not uncommon to refuse to make any enquiry and to refer the applicant to a regular suit. The limitation for such applications is 30 days from the date of dispossession. See Article 165, Schedule II, Act XV of 1877.

10. If the officer charged with the execution of a decree for the possession of property is resisted or obstructed by the judgment-debtor, or any person on his behalf, and the decree-holder complains of such resistance or obstruction within one month, sections 328 to 330 prescribe the procedure to be followed, and section 334 extends the same procedure to the case of a purchaser of immoveable property sold in execution of decree being obstructed in obtaining possession of the property.

11. Section 331 provides for the cases where the resistance or obstruction has been occasioned by any person other than the judgment-debtor claiming in good faith to be in possession on his own account, or on account of some person other than the judgment-debtor. No such provision is necessary in the case of property sold in execution of decree, as the possession of a person in this position

should not be interfered with until the purchaser establishes by separate suit that the right of the judgment-debtor, which he has purchased, is superior to that of such person. But if a person not in possession, but claiming a right to possession resists or obstructs the purchaser, section 335 enables the court executing the decree, on the complaint of the purchaser to enquire into the matter and pass orders thereon. The limitation for complaints by a purchaser in execution of decree of resistance or obstruction in obtaining possession of the property is 30 days from the date of the resistance or obstruction under Article 167 of Schedule II to Act XV of 1877.

12. Section 313 enables the purchaser at a sale of immoveable property in execution of decree to apply to the Court to set aside the sale on the ground that the debtor had no saleable interest therein. Such application may be made within 60 days from the date of the sale (See Article 172, Schedule II, Act XV of 1877). When such a sale is set aside, either on this ground, or for a material irregularity in conducting it, by which either the decree-holder or the purchaser has been prejudiced, or when a purchaser, after obtaining possession, is deprived of possession, on the ground that the judgment-debtor had no saleable interest in the property, section 315 provides for the recovery and repayment to the purchaser of the purchase-money. The Court should not refer him to a separate suit for the money paid by him.

13. Attention is also drawn to the provisions of section 274 as to the mode of attaching immoveable property, and those of sections 278 to 283 as to claims to attached property and objections.

BOOK CIRCULAR No. $\left\{ \frac{\text{XVI}}{3082} \right\}$ OF 1878.

To

ALL JUDICIAL OFFICERS IN THE PUNJAB.

Dated 17th December 1878.

The Judges of the Chief Court have recently had before them a collection of the decisions of the Punjab Courts under Section 304A of the Indian Penal Code, which was called for in March 1877.

2. They regret to observe that the scope and meaning of that section has been very generally misunderstood. In some of the cases which have been tried under it, the proper charge would have been culpable homicide, or even murder. In others, where the intention or knowledge required to support a charge of culpable homicide was apparently wanting, there was manifestly an intention to cause either hurt or grievous hurt, or a knowledge that the act done was likely to cause hurt or grievous hurt, and sometimes dangerous weapons or means were used for this purpose. In such cases the proper charge would have been one under Section 323, or one of the following sections, under most of which a much more severe sentence could have been inflicted than under Section 304 A. In other cases, again, the act from which death resulted appears to have been done in the lawful exercise of the right of private defence (*see* Sections 96 to 106 of the Indian Penal Code), or it was a lawful act, done in a lawful manner, by lawful means and with proper care and caution (*see* Section 80), and though death accidentally resulted, it cannot be said to have been caused by a rash or negligent act.

3. Thus, in some cases, innocent persons appear to have been punished, while in others, Courts have exercised a jurisdiction which did not belong to them in trying persons who had really committed culpable homicide, or even, it may be, murder; and in others again, persons have been sentenced to fine only for offences which really fell under one of the Sections 325 to 331 or 333, in which imprisonment should have formed part of the sentence.

4. The following instructions are therefore issued for the guidance of the Courts subordinate to the Chief Court.

5. It is a mistake to suppose that, when death results from acts done with the intention of causing hurt or grievous hurt, or with the knowledge that hurt or grievous hurt are likely to be caused, but without the intention or knowledge required to constitute the offence of culpable homicide, the offender is not liable to be punished for what he intended or knew himself to be likely to cause, because a more serious consequence has followed. And acts done with such an intention or knowledge cannot properly be described as rash or negligent acts. A man does not do negligently what he does wilfully; a man does not do rashly what he does knowing what the probable consequences of his act are, or intending to produce such consequences.

6. A rash act, such as would bring an offender under Section 304A, may be illustrated by the case of a man firing a bullet at a deer near a village, when there was a chance that if he missed the deer he might hit some one in a field concealed from his view, when he had no reason to think it likely that any person was near.

7. A negligent act, such as would, if death resulted, bring a man under Section 304A, may be illustrated by the case of an engine-driver not looking out for signals while driving his engine, though he may have had reason to believe that

the line was clear; or by that of a man having reason to believe a gun to be unloaded, but not having taken proper precautions to ascertain that it was not loaded, pointing it in sport at another and drawing the trigger. Other instances when the section would apply are cases of rash or negligent driving. As, if a person driving a cart or other carriage happen to kill another, and it appears that he might have seen the danger, but did not look before him, thus evincing want of due circumspection. So, if the driver of a carriage urge his horses to such a pace that he loses command over them, and thereby death is occasioned; or if he be racing with another carriage, and, from being unable to pull up his horses in time, the carriage is upset and a person killed.

8. In short, the words "rash or negligent" in Section 304A, should be interpreted precisely as they would be in cases falling under Sections 279, 280, 282, 284 to 289, and 336 to 338.

9. It is clear, too, from the use of the words "not amounting to culpable homicide" in Section 304A, that when the acts done do amount to culpable homicide, it is illegal to punish under that section.

10. If a Court is doubtful whether the act done is one which can properly be described as a "rash or negligent act," or whether it does not "amount to culpable homicide," it would manifestly be wrong for it to treat that section as covering the offence; and in the latter case, a Magistrate who is not specially empowered under Section 36 of the Criminal Procedure Code should not try the case himself, but should either commit it to the Court of Session, or send it to a Magistrate who is so empowered, if it appears that the sentence which the latter could pass would be adequate.

11. In many of the cases which have come under the observation of the Court, the sentence passed has been quite inadequate to the facts found. The Court requests that Magistrates of Districts will in future take measures to have all convictions, in cases where death has been caused, whether for causing death by a rash or negligent act, for voluntarily causing hurt, or for voluntarily causing grievous hurt, brought under their notice; and that, after inspecting the files, they will report all cases in which the sentence appears decidedly inadequate, or the Court seems to have exercised a jurisdiction which did not belong to it. And, until the law is better understood, they should also report cases in which no rash or negligent act appears to have been committed by the person convicted, or in which he is entitled to the benefit of the general exceptions to the Indian Penal Code, unless the error has been set right, or is likely to be set right, on appeal.

12. To illustrate the circumstances under which Section 304A, is not applicable, the facts in evidence amounting to culpable homicide or to murder, the following passage is cited from a Judgment of the High Court of Madras (7 Madras High Court, 119).

"In this case, the prisoner killed his own mother by beating and kicking her. The Sessions Judge finds that the death resulted from a brutal beating and kicking, but he acquits of culpable homicide, because the violence was not such as the prisoner must have known to be likely to cause death. This is, it is manifest, no ground for acquitting of culpable homicide not amounting to murder; with such knowledge the act would be murder (P. C. Section 300, clause 2). The question for the Judge was whether the act was done with the knowledge of causing bodily injury which was likely to cause death. The Judge finds the brutal beating and kicking and dragging by the hair of the head of an old woman of 60 by a powerful man, who so acted without the smallest provocation. The causal connection between the brutal

assault and the death is found to be undoubted, but the Sessions Judge has convicted the prisoner under the new section of causing death by a rash act. This section is, in our opinion, wholly inapplicable to the facts of this case. Culpable rashness is acting with the consciousness that the mischievous and illegal consequence may follow, but with the hope that they may not, and often with the belief that the actor has taken sufficient precautions to prevent their happening. The imputability arises from acting despite the consciousness. Culpable negligence is acting without the consciousness that the illegal or mischievous effect will follow, but in circumstances which show that the actor has not exercised the caution incumbent upon him, and that if he had, he would have had the consciousness. The imputability arises from the neglect of the civil duty of circumspection. It is manifest that personal injury consciously and intentionally caused cannot fall within either of these categories, which are wholly inapplicable to the case of an act or series of acts themselves intended, which are the direct producers of death. To say that because in the opinion of the operator, the sufferer could have borne a little more without death following the act, amounts merely to rashness, because he has carried the experiment too far, results from an obvious and dangerous misconception. As this is neither a case of rashness nor of negligence, it becomes unnecessary to consider whether, in any case, a conviction under this section can properly follow, where the rashness or negligence amounts to culpable homicide. It is clear, however, that if the words 'not amounting to culpable homicide,' are part of the definition, the offence defined by this section consists of the rash or negligent act not falling under that category, as much as of its fulfilling the positive requirement of being the cause of death."

BOOK CIRCULAR No. $\left\{ \frac{\text{XVII}}{3134} \right\}$ OF 1878.

To

ALL COMMISSIONERS AND DEPUTY COMMISSIONERS IN THE
PUNJAB.

Dated 23rd December 1878.

In a Circular letter issued from this office on October 31st, 1877, Deputy Commissioners were requested to submit, for the approval of the Chief Court, rules for regulating the distribution of the civil business of their districts. In the replies which have been received to this letter, many experienced officers have strongly urged the desirability of leaving to Deputy Commissioners the widest possible discretion in arranging for the distribution of the judicial work of their districts. It has been pointed out that the arrangements must, in each case, largely depend upon the strength and comparative efficiency of the staff which the Deputy Commissioner has at his command, and that, as these elements are constantly changing, the Deputy Commissioner must as constantly change his rules, and adapt them to the altered circumstances of his district.

2. In these views the Judges generally concur. They are quite prepared to admit that the details of distribution can only be satisfactorily settled by each Deputy Commissioner for his own district, and that it would be unwise to attempt to do more than indicate the general principles which should be observed in framing rules. In leaving, therefore, to Deputy Commissioners full discretion to frame,

from time to time, suitable rules for the distribution of the judicial business of their districts, the Court will only ask them to be careful that such distribution is always regulated by clear and definite rules, and that in framing rules for the distribution of civil business, the following general principles may be borne in mind:—

- I.—Precise rules should be laid down as to the classes and values of suits to be entertained by each Tahsildar and Munsiff, and by such Honorary Civil Judges as receive petitions direct, within the whole or a specified portion of their respective local jurisdictions.
- II.—Where the Deputy Commissioner has directed that a particular class of cases is to be heard within certain limits by a certain officer, *all* such cases should be instituted in the Court of that officer, and not elsewhere.
- III.—In determining what classes of cases are to be taken up by the different Courts and in fixing limits of value, the capabilities of each Court should be taken into consideration. Honorary Civil Judges, with jurisdiction within the limits of a tract specially set apart for the purpose, should ordinarily take up all cases within their competence, unless such an arrangement will impose on them an undue burden of work. In tahsils where there are Naib Tahsildars exercising civil powers, the rules may provide for a limited number of cases being made over to the Naib Tahsildar, each month, by the Tahsildar, or Munsiff, or both.
- IV.—The rules should fix the maximum number of fresh cases which each Tahsildar and Munsiff is to retain each month in his own Court, and in the Court of the Naib Tahsildar subordinate to him, where he has been empowered to make over cases to a Naib Tahsildar, and should provide for all petitions instituted beyond that number being referred for orders either to the officer at the Sadr to whom the referring Court is subordinate under Rule VI below, or, if the Court is subordinate to an officer holding charge of a division of the district, to such Divisional Officer. What number should be fixed as the maximum in each case is a matter which can only be determined by the Deputy Commissioner with reference to the particular circumstances of his district. Ordinarily, however, a Tahsildar should not be allowed to take up more than 30, or a Munsiff more than 250, fresh cases in any one month. In any case in which it may be necessary to require a Tahsildar to take up more than 30 cases a month, the previous sanction of the Chief Court should be obtained through the Commissioner of the Division.
- V.—Plaints referred to the head-quarters of a district, or a division of a district, under the circumstances described above, should be sent by post, or by a messenger of the Court, after being endorsed with the date of presentation and an order of reference; and at the same time a memorandum should be given to the person presenting the plaint, informing him of the name of the officer to whom his petition has been referred, and of the date on which he must appear before such officer to prosecute his suit. Deputy Commissioners should fix for each outlying Court the number of days to be ordinarily allowed for the journey to the head-quarters of the district, or the division of the district, as the case may be, and the date fixed for the appearance of the petitioner should be regulated accordingly and noted in the order of reference.
- VI.—Distinct rules should be laid down for the reception and distribution by the Deputy Commissioner, or one or more officers of the head-quarters' staff, of such petitions as, under the rules in force, are required to be

presented at the Sadr, and for the distribution of petitions referred to the Sadr under Rule IV by subordinate Courts. No petition, unless so referred should be received at the Sadr which could, under the rules in force, have been presented to a subordinate Court. Conversely, no petition should be received by a Tahsildar, Munsiff, or Honorary Judge, in a suit which he is not competent to try, or which, under the rules in force, he is not permitted to try.

It will of course, however, be understood that this rule is not intended to limit in any way the power of the Deputy Commissioner to order, on good cause being shown, the transfer of any suit or proceeding from one subordinate Court to any other subordinate Court competent to deal with the case.

3. In fixing the classes of cases to be taken up by Tahsildars, Munsiffs and Honorary Judges, and in distributing civil work between the superior Courts at head-quarters, it should be remembered, that, under rules recently issued by the Chief Court, suits relating to property in land, including suits for pre-emption and suits under mortgages for possession, redemption or foreclosure, in which the revenue payable to Government on the subject-matter of the suit exceeds Rs. 20 per annum are to be tried exclusively by officers with full civil powers. Other suits relating to land, and suits under the Punjab Tenancy Act, may usually (up to a limit of 30 a month) be suitably left to be disposed of by Tahsildars, who from their experience as Revenue Officers and their familiarity with local tenures and customs, and the facility with which they can make local investigations, are ordinarily the most competent and suitable judges in such matters. Suits connected with betrothals and for the restitution of conjugal rights, and suits under the Specific Relief Act, should only be taken up by experienced officers, though not necessarily by officers of superior grades.

ACTS OF THE LEGISLATURE,
1878.



ACTS OF THE LEGISLATURE.

ACT No. I OF 1878.

The Opium Act, 1878.

(Passed on the 7th January 1878.)

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SCHEDULE.

An Act to amend the law relating to Opium.

WHEREAS it is expedient to amend the law relating to opium ; It is hereby enacted as follows :—

1. This Act may be called “ The Opium Act, 1878 ” :

It shall extend to such local areas as the Governor General in Council may, by notification in the *Gazette of India*, from time to time direct ;

And it shall come into force in each of such areas on such day as the Governor General in Council in like manner directs in this behalf.

2. The enactments mentioned in the schedule hereto annexed shall be repealed to the extent specified in the third column of the said schedule :

And in Acts No. XI of 1849, No. XXI of 1856, and No. X of 1871, and in Bengal Act No. II of 1876, the words "intoxicating drugs" (wherever they occur) shall not include opium.

The reference made to Bombay Regulations XXI of 1827 and XX of 1830 in Act No. VII of 1836 shall be read as if made to the corresponding sections of this Act.

3. In this Act, unless there be something repugnant in the subject or context—

"Opium" includes also poppy-heads, preparations or admixtures of opium, and intoxicating drugs prepared from the poppy :

"Magistrate" means, in the Presidency-towns, a Presidency Magistrate, and elsewhere a Magistrate of the first class or (when specially empowered by the Local Government to try cases under this Act) a Magistrate of the second class :

"Import" means to bring into the territories administered by any Local Government from sea, or from foreign territory, or from a territory administered by any other Local Government :

"Export" means to take out of the territories administered by any Local Government to sea, or to any foreign territory, or to any territory administered by another Local Government :

"Transport" means to remove from one place to another within the territories administered by the same Local Government.

4. Except as permitted by this Act, or by any other enactment relating to opium for the time being in force, or by rules framed under this Act or under any such enactment, no one shall—(a) cultivate the poppy ; (b) manufacture opium ; (c) possess opium ; (d) transport opium ; (e) import or export opium ; or (f) sell opium.

5. The Local Government, with the previous sanction of the Governor General in Council, may, from time to time by notification in the local Gazette, make rules consistent with this Act, to permit absolutely or subject to the payment of duty or to any other conditions and to regulate within the whole or any specified part of the territories administered by such Government, all or any of the following matters :—

(a) the cultivation of the poppy ; (b) the manufacture of opium ; (c) the possession of opium ; (d) the transport of opium ; (e) the importation or exportation of opium ; and (f) the sale of opium, and the farm of duties leviable on the sale of opium by retail :

Provided that no duty shall be levied under any such rule on any opium imported and on which a duty is imposed by or under the law relating to sea customs for the time being in force or under section six.

6. The Governor General in Council may from time to time, by notification in the *Gazette of India*, impose such duty as he thinks fit on opium or on any kind of opium imported by land into British India or into any specified part thereof, and may alter or abolish any duty so imposed.

7. The Governor General in Council may, by order notified in the *Gazette of India*,

(a) authorize any Local Government to establish warehouses for opium legally imported into, or intended to be exported from, the territories administered by such Local Government, and

(b) cancel any such order.

So long as such order remains in force, the Local Government may, by notification published in the official Gazette,

(c) declare any place to be a warehouse for all or any opium legally imported, whether before or after the payment of any duty leviable thereon, into the territories administered by such Government, or into any specified part thereof, or intended to be exported thence, and

(d) cancel any such declaration.

An order under clause (b) shall cancel all previous declarations under clause (c) of this section relating to places in the territories to which such order refers.

So long as such declaration remains in force, the owner of all such opium shall be bound to deposit it in such warehouse.

8. The Local Government, with the previous sanction of the Governor General in Council, may, from time to time by notification in the local Gazette, make rules consistent with this Act to regulate the safe custody of opium warehoused under section seven; the levy of fees for such warehousing; the removal of such opium for sale or exportation; and the manner in which it shall be disposed of, if any duty or fees leviable on it be not paid within twelve months from the date of warehousing the same.

9. Any person who, in contravention of this Act, or of rules made and notified under section five or section eight, (a) cultivates the poppy, or (b) manufactures opium, or (c) possesses opium, or (d) transports opium, or (e) imports or exports opium, or (f) sells opium, or (g) omits to warehouse opium or removes or does any act in respect of warehoused opium, and any person who otherwise contravenes any such rule, shall, on conviction before a Magistrate, be punished for each such offence with imprisonment for a term which may extend to one year, or with fine which may extend to one thousand rupees, or with both; and, where a fine is imposed, the convicting Magistrate shall direct the offender to be imprisoned in default of payment of the fine for a term which may extend to six months, and such imprisonment shall be in excess of any other imprisonment to which he may have been sentenced.

10. In prosecutions under section nine, it shall be presumed, until the contrary is proved, that all opium for which the accused person is unable to account satisfactorily is opium in respect of which he has committed an offence under this Act.

11. In any case in which an offence under section nine has been committed—

(a) the poppy so cultivated;

(b) the opium in respect of which any offence under the same section has been committed;

(c) where, in the case of an offence under clause (d) or (e) of the same section the offender is transporting, importing or exporting any opium exceeding the quantity (if any) which he is permitted to transport, import or export, as the case may be, the whole of the opium which he is transporting, importing or exporting;

(d) where, in the case of an offence under clause (f) of the same section, the offender has in his possession any opium other than the opium in respect of which the offence has been committed, the whole of such other opium,

shall be liable to confiscation.

The vessels, packages and coverings in which any opium liable to confiscation under this section is found, and the other contents (if any) of the vessel or package in which such opium may be concealed, and the animals and conveyances used in carrying it, shall likewise be liable to confiscation.

12. When the offender is convicted, or when the person charged with an offence in respect of any opium is acquitted, but the Magistrate decides that the opium is liable to confiscation, such confiscation may be ordered by the Magistrate.

Whenever confiscation is authorised by this Act, the officer ordering it may give the owner of the thing liable to be confiscated an option to pay, in lieu of confiscation, such fine as the officer thinks fit.

When an offence against this Act has been committed, but the offender is not known or cannot be found, or when opium not in the possession of any person cannot be satisfactorily accounted for, the case shall be enquired into and determined by the Collector of the District or Deputy Commissioner, or by any other officer authorized by the Local Government in this behalf, either personally or in right of his office, who may order such confiscation: Provided that no such order shall be made until the expiration of one month from the date of seizing the things intended to be confiscated or without hearing the persons (if any) claiming any right thereto and the evidence (if any) which they produce in support of their claims.

13. The Local Government may, with the previous sanction of the Governor General in Council, from time to time, by notification in the local Gazette, make rules consistent with this Act to regulate—

(a) the disposal of all things confiscated under this Act; and

(b) the rewards to be paid to officers and informers out of the proceeds of fines and confiscations under this Act.

14. Any officer of any of the departments of Excise, Police, Customs, Salt, Opium or Revenue, superior in rank to a peon or constable, who may in right of his office be authorized by the Local Government in this behalf, and who has reason to believe, from personal knowledge or from information given by any person and taken down in writing, that opium liable to confiscation under this Act is manufactured, kept or concealed in any building, vessel or enclosed place, may between sunrise and sunset,

(a) enter into any such building, vessel or place;

(b) in case of resistance, break open any door and remove any other obstacle to such entry;

(c) seize such opium and all materials used in the manufacture thereof, and any other thing which he has reason to believe to be liable to confiscation under section eleven or any other law for the time being in force relating to opium, and

(d) detain and search, and if he think proper arrest, any person whom he has reason to believe to be guilty of any offence relating to such opium under this or any other law for the time being in force.

15. Any officer of any of the said departments may

(a) seize, in any open place or in transit, any opium or other thing which he has reason to believe to be liable to confiscation under section eleven or any other law for the time being in force relating to opium,

(b) detain and search any person whom he has reason to believe to be guilty of any offence against this or any other such law, and, if such person has opium in his possession, arrest him and any other persons in his company.

16. All searches under section fourteen or section fifteen shall be made in accordance with the provisions of the Code of Criminal Procedure.

17. The officers of the several departments mentioned in section fourteen shall, upon notice given or request made, be legally bound to assist each other in carrying out the provisions of this Act.

18. Any officer of any of the said departments who, without reasonable ground of suspicion, enters or searches, or causes to be entered or searched, any building, vessel or place, or vexatiously and unnecessarily seizes the property of any person on the pretence of seizing or searching for any opium or other thing liable to confiscation under this Act, or vexatiously and unnecessarily detains, searches or arrests any person, shall for every such offence be punished with fine not exceeding five hundred rupees.

19. The Collector of the District, Deputy Commissioner or other officer authorized by the Local Government in this behalf, either personally or in right of his office, or a Magistrate, may issue his warrant for the arrest of any person whom he has reason to believe to have committed an offence relating to opium, or for the search, whether by day or night, of any building or vessel or place in which he has reason to believe opium liable to confiscation to be kept or concealed.

All warrants issued under this section shall be executed in accordance with the provisions of the Code of Criminal Procedure.

20. Every person arrested, and thing seized, under section fourteen or section fifteen, shall be forwarded without delay to the officer in charge of the nearest police-station; and every person arrested and thing seized under section nineteen shall be forwarded without delay to the officer by whom the warrant was issued.

Every officer to whom any person or thing is forwarded under this section shall, with all convenient despatch, take such measures as may be necessary for the disposal according to law of such person or thing.

21. Whenever any officer makes any arrest or seizure under this Act, he shall within forty-eight hours next after such arrest or seizure make a full report of all the particulars of such arrest or seizure to his immediate official superior.

22. In the case of illegal cultivation of the poppy, the crop shall not be removed, but shall, pending the disposal of the case, be attached by an officer superior in rank to a peon or constable, who may in right of his office be authorized by the Local Government in this behalf; and such officer shall require the cultivator to give bail in a reasonable amount (to be fixed by such officer) for his appearance before the Magistrate by whom the case is to be disposed of, and such cultivator shall not be arrested unless within a reasonable time he fails to give such bail:

Provided that, wherever Act No. XIII of 1857 (*An Act to consolidate and amend the law relating to the cultivation of the Poppy and the manufacture of Opium in the Presidency of Fort William in Bengal*), or any part thereof, is in force, nothing in this section shall apply to such cultivation.

23. Any arrear of any fee or duty imposed under this Act or any rule made hereunder, and any arrear due from any farmer of opium revenue, may be recovered from the person primarily liable to pay the same to the Government or from his surety (if any) as if it were an arrear of land revenue.

24. When any amount is due to a farmer of opium-revenue from his licensee, in respect of a license, such farmer may make an application to the Collector of the District, Deputy Commissioner or other officer authorized by the Local Government in this behalf, praying such officer to recover such amount on behalf of the applicant; and on receiving such application, such Collector, Deputy Commissioner or other officer may in his discretion recover such amount as if it were an arrear of land-revenue, and shall pay any amount so recovered to the applicant:

Provided that the execution of any process issued by such Collector, Deputy Collector or other officer for the recovery of such amount, shall be stayed if the licensee institutes a suit in the Civil Court to try the demand of the farmer and furnishes security to the satisfaction of such officer for the payment of the amount which such Court may adjudge to be due from him to such farmer:

Provided also that nothing contained in this section or done thereunder shall affect the right of any farmer of opium-revenue to recover by suit in the Civil Court or otherwise any amount due to him from such licensee.

25. When any person in compliance with any rule made hereunder gives a bond for the performance of any duty or act, such duty or act shall be deemed to be a public duty or an act in which the public are interested, as the case may be, within the meaning of the Indian Contract Act, 1872, section 74, and upon breach of the condition of such bond by him, the whole sum named therein as the amount to be paid in case of such breach may be recovered from him as if it were an arrear of land-revenue.

SCHEDULE.

ACTS OF THE GOVERNOR GENERAL IN COUNCIL.

Number and year.	Subject.	Extent of repeal.
Act XI of 1849.	A'b'kari Revenue of Calcutta ...	In section 5 the word "opium." In section 6, the word "opium" and the last thirty-one words. In section 15, from and including the words "except in the case," to the end of the section. In section 33, from and including the words "except opium" down to and including the words "each seer;" and the words "or in the case of opium as aforesaid, a reward of one rupee eight annas for each seer."
Act III of 1852. Act XXI of 1856.	Spirituous liquors, Bombay ... Bengal A'b'kari Act ...	Section 10, so far as it relates to opium. In section 28 the word "opium." Sections 34, 51, 52, 53 and 87. In section 35, the words "or opium." In section 49, the words "except opium." Section 59, so far as it relates to opium. In section 75, the words "except opium" and from and including the words "opium seized," down to the end. In section 76, from and including the words "except opium," down to and including the words "each seer;" and from and including the words "or in," down to and including the words "each seer." In paragraph 8 of section 90, the words "and opium."
Act XIII of 1857. Act X of 1871.	Cultivation of the poppy and manufacture of opium. The Northern India Excise Act,	Section 2. In paragraph 5 of section 3, the word "opium." Sections 18, 65, 66, 67 and 87. In section 19, the words "or opium." Section 46, so far as it relates to opium. In section 46, paragraph 3, from and including the words "as well as," down to and including the words "dealings in opium." In section 63, the words "except opium." In section 78, the words "except opium," and paragraph 2. In section 79, from and including the words "except opium," down to and including the words "each seer," and

ACTS OF THE GOVERNOR GENERAL IN COUNCIL.—(Continued.)

Number and year.	Subject.	Extent of repeal.
Act IV of 1872.	The Punjab Laws Act ...	from and including the words "or in." down to and including the words "each seer."
Act XXVI of 1872.	Panjab Opium Law Amendment.	Section 49.
Act VI of 1873.	Transhipment of goods ...	The whole Act.
Act XVI of 1875.	The Indian Tariff Act ...	Section 7.
Act XXIII of 1876.	To amend the law relating to Opium.	Section 9.
		The whole Act.
Act VI of 1877.	For postponing the day on which the Opium Act, 1876, is to come into force.	The whole Act.

Acts of the Lieutenant-Governor of Bengal in Council.

Number and year.	Subject.	Extent of repeal.
Act II of 1876.	To amend Act XI of 1849, Act XXI of 1856, and Act IV (B. C.) of 1866.	<p>In section 3, in the section substituted for section 33 of Act XI of 1849, the words "except opium," and from and including the words "confiscated opium" down to and including the words "general order."</p> <p>In section 3, in the section substituted for section 34 of Act XI of 1849, the words "except in the case of opium," and from and including the words "and in the case of opium" down to and including the words "similarly distributed."</p> <p>In section 10, in the section substituted for section 75 of Act XXI of 1856, the words "except opium," and from and including the words "confiscated opium" down to and including the words "general order."</p> <p>In section 10, in the section substituted for section 76 of Act XXI of 1856, the words "except in the case of opium," and from and including the words "and in the case of opium" down to and including the words "similarly distributed."</p>

Bombay Regulations.

Number and year.	Subject.	Extent of repeal.
Bombay Regulation XXI of 1827.	Duty on opium ...	The preamble, from and including the words "with the combined," down to and including the words "the prohibited."
Bombay Regulation XX of 1830.	Malwa opium ...	<p>Chapters I, II, III and IV.</p> <p>So much as has not been repealed.</p>

ACT NO. II OF 1878.

(Passed on the 9th February 1878).

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SCHEDULE.

*An Act for the licensing of trades and dealings in the Punjab,
the North-Western Provinces and Oudh.*

WHEREAS, in order to provide means for defraying the public expenditure from time to time incurred and to be incurred for the relief and prevention of famine in British India, it is necessary to effect a permanent increase of the revenue; and it is therefore expedient that persons carrying on trades and dealings in the territories and provinces respectively administered by the Lieutenant-Governor of the Punjab, the Lieutenant-Governor of the North-Western Provinces and the Chief Commissioner of Oudh, should take out licenses and pay for the same; It is hereby enacted as follows:—

1. This Act may be called "The Northern India License Act, 1878:—"

It extends to the territories under the administration of the Lieutenant-Governor of the Punjab, the Lieutenant-Governor of the North-Western Provinces and the Chief Commissioner of Oudh, respectively; but nothing herein contained applies to persons earning their livelihood solely by agriculture.

This Act shall come into force in each of the said territories on such date as the Governor General in Council by notification in the *Gazette of India* directs in this behalf.

2. When this Act comes into force in the territories under the administration of the Lieutenant-Governor of the North-Western Provinces, Act No. VIII of 1877 (*for the licensing of certain trades and dealings in the North-Western Provinces*) shall be repealed.

3. In this Act "Collector" means the chief officer in charge of the revenue-administration of a district.

4. Every person who, on or after the first day of April 1878, falls under any of the heads specified in the schedule hereto annexed, and carries on (whether on behalf of himself or any other person) his trade or dealing in any district situate in the said territories, shall take out a license under this Act in such district, and shall pay for the same the annual fee mentioned in such schedule as payable by persons of the class and grade to which he belongs.

5. Such license shall be granted by the Collector of such district, and shall be signed by him, or by such officer as he may appoint in this behalf.

6. Every such license shall specify—

- (a) the date of the grant thereof;
- (b) the name, father's name, caste and trade or dealing of the licensee;
- (c) the class and grade to which he belongs;
- (d) the fee paid for the license;
- (e) the term for which the license shall remain in force, and
- (f) the place or places within such district where the licensee intends to carry on his trade or dealing during such term;

and shall be received in evidence as *prima facie* proof of all matters contained therein.

7. Every such license shall have effect in such district only, and shall continue in force from the day of the date thereof till the first day of January next after the date of the grant thereof.

8. Every person to whom any such license has been granted, and who desires to continue to carry on his trade or dealing in such district after the expiration of such license, shall take out a fresh license for that purpose for the following year, to expire on the day appointed in the last preceding section, and shall renew the same so long as he desires to continue to carry on such trade or dealing in such district.

9. As soon as may be after the first day of April 1878 and the first day of January in every subsequent year, the Collector shall prepare a list of the persons to be licensed under this Act in his district. Such list shall state—

- (a) the trade or dealing of each of the persons therein named;
- (b) the class and grade under which he is charged; and
- (c) the fee to be paid for his license.

Such list shall be in the language of the district, shall be filed in the office of the Collector, and shall be open to public inspection at all reasonable times without any payment.

10. The Collector shall, from time to time, determine under which of the classes and grades mentioned in the said schedule every person to whom a license may be granted by him as aforesaid shall be charged, and shall amend the said list accordingly.

The list or such part or parts thereof as the Collector thinks fit shall be published in the principal mnhallas or ganjes of all towns, and in the chaupal, or other public place, in all villages concerned, together with a notification that if any person falling under any of the heads specified in the said schedule, whether he is mentioned in such list or not, continues his trade or dealing in the said district, payment of the fee specified in the list as payable by him, or, when he is not mentioned in the said schedule as payable by persons of the class and grade to which he belongs, must be made by him in the year 1878 within thirty days of such publication, and in each succeeding year before the first day of February.

11. The Collector may, by a notice in writing, require the occupier of any house to forward to him a statement in writing signed by such occupier, of the names of all the persons residing in such house at the date of the notice and of their respective callings.

12. Any person mentioned in the list referred to in sections nine and ten and objecting to the class or grade under which he is charged may, within such further time as the Collector may in each case think fit, apply by petition to the Collector in order to establish his right to have his name transferred to another class or grade, or altogether removed from the list.

13. The Collector shall fix a day for the hearing of the petition, and on the day so fixed, or on such subsequent day as he may from time to time direct, shall hear the same and pass such order thereon as he thinks fit :

Provided that if, in his judgment, the petitioner is able to shew that the fee which has been charged exceeds two per cent upon his annual nett earnings, such excess shall, for the purpose of section twelve, be deemed a valid objection.

14. The Collector may, for the purposes of any proceeding under section thirteen, exercise any of the powers conferred by the Code of Civil Procedure on a Civil Court for the trial of suits :

Provided that the Collector shall not, in the course of any such proceeding, call for any evidence except at the instance of the petitioner, or in order to ascertain the correctness of facts alleged by him.

15. Subject to the control of the Local Government, the Commissioner of Revenue of the Division may, in his discretion, on the application of any person deeming himself aggrieved by an order passed by the Collector under section thirteen, call for the record of the case, and pass such order thereon as he thinks fit, and such order shall be final.

16. The Collector may in his discretion remit the whole or any part of the fee payable under this Act by any person who has carried on his trade or dealing for a portion of the year only.

17. A person or firm coming under more than one of the designations in the said schedule shall be chargeable only under one of the said designations at the discretion of the Collector ; and in the case of a firm, payment by any one of the partners shall, for the purposes of this Act, be considered payment by the firm.

18. If, after expiry of the period mentioned in the notification published under section ten, for payment of the fee specified or referred to therein, any person (whether he is or not mentioned in the said list) carries on his trade or dealing without having taken out a license as required by this Act, he shall be liable, by order of the Collector, to pay a fine not exceeding thrice the amount payable by him in respect of such license, exclusive of the amount so payable ; and on receipt of such payment the Collector shall grant him a license.

19. All sums due under section eighteen and all fees payable under this Act or the said Act No. VIII of 1877 shall be recoverable as if they were arrears of land-revenue.

But no fees or other sums due under this Act or the said Act No. VIII of 1877 shall be recoverable by any process whatsoever after the expiry of three months from the last day of the year in respect of which they are payable.

20. Every person holding a license under this Act shall produce and show such license when required so to do by an officer generally or specially empowered in writing by the Collector to make such requisition.

But no person shall be proceeded against for neglect or refusal to produce such license except at the instance of the Collector.

21. Courts of Wards and Receivers and managers appointed by any Court in British India, shall be chargeable under this Act in respect of any trade or dealing of which the income is officially in their possession or under their control.

22. When any trustee, guardian, curator, committee or agent is charged under this Act in such capacity, or when any Court of Wards or Receiver or manager appointed by any Court is charged under this Act, every person and Court so charged may, from time to time, out of the money coming to his or its possession as such trustee, guardian, curator, committee or agent, or as such Court of Wards, Receiver or manager, retain so much as is sufficient to pay the fee charged.

Every such person or Court is hereby indemnified for every retention and payment made in pursuance of this Act.

23. The nett amount of all fees and penalties paid or recovered under this Act, after deducting the expenses of collection, or such portion of such nett amount as the Governor-General in Council from time to time directs, shall be applied, in such manner as the Governor-General in Council thinks fit, for the purpose of increasing the revenues available for defraying expenditure incurred or to be incurred for the relief and prevention of famine in the territories administered by the Local Government, or, if the Governor-General in Council so directs, in any other part of British India.

The residue (if any) of such nett amount shall be carried to the credit of the Local Government.

24. All or any of the powers and duties conferred and imposed by this Act on a Collector may, subject to the control and orders of the Collector of the District, be exercised and performed by an Assistant Collector or such other officer as the Local Government from time to time appoints in this behalf.

25. Every person shall be legally bound to furnish information to any officer exercising any of the powers of a Collector under this Act when required by him to do so.

26. The Local Government may, from time to time, with the previous sanction of the Governor-General in Council,—

(a) exempt any portion of the territories administered by such Government, or any persons or class of persons in such territories, from the operation of this Act, and cancel such exemption ;

(b) exempt from the operation of this Act any persons whose respective nett annual earnings are less than such sum as the Local Government may, from time to time, fix in this behalf, and cancel such exemption ;

(c) make rules consistent with this Act, (1) for regulating the time and manner of collecting the fees charged under this Act, (2) for providing in any case or class of cases for serving notices on persons charged under this Act, (3) for determining the mode in which persons belonging to any class shall be distributed into grades, and (4) generally for the guidance of officers in matters connected with the enforcement of this Act.

THE SCHEDULE. See Section 4.

CLASS I.

Companies registered under the Indian Companies' Act 1866,					Fee payable by licensee.	
Bankers	...	...	...	...		Rs.
Professional money-lenders	...	...	...	...		500
Owners of cotton-screws	...	...	...	...	First grade	200
Persons keeping shops for the sale of European goods	...	...	...	...	Second grade	150
Hotel-keepers	...	...	...	...	Third grade	100
Wholesale-dealers	...	...	...	...	Fourth grade	
Dealers in precious stones	...	...	...	...
Sugar Manufacturers or Refiners	...	...	...	...
Indigo Manufacturers	...	...	...	...
Tea Manufacturers	...	...	...	...

CLASS II.

Cloth-sellers	...	...	...	...
Metal-vessel-sellers	...	...	...	...
Fuel-sellers (talwalas)	...	...	...	...
Chaudhris	...	...	...	...
Letters-out of conveyances and cattle	...	...	...	...
Contractors (thikadars)	...	...	...	...
Printers and publishers	...	...	...	...
Manufacturers of lac	...	...	...	...
Commission-agents	...	...	...	...
Brokers	...	...	...	...
Bill-brokers	...	...	...	...
Pawn-brokers	...	...	...	...
Money-changers	...	...	...	...
Dealers in gold and silver lace	...	...	...	...	First grade	Rs. 75
Druggists	...	...	...	...	Second grade	50
Harness-makers	...	...	...	...	Third grade	25
Dealers in metals, not being merely artisans	...	...	...	...	Fourth grade	10
Grain-lenders	...	...	...	...
Retail-dealers in grain	...	...	...	...
Auctioneers	...	...	...	...
Coach-builders	...	...	...	...
Tobacco-sellers	...	...	...	...
Dealers in horses, cattle or elephants	...	...	...	...
Timber-merchants	...	...	...	...
Woollen manufacturers	...	...	...	...
Silk ditto	...	...	...	...

Persons carrying on trades and dealings specified in class I whose annual earnings are not so large as to warrant their assessment in that class.

CLASS III.

Artizans, traders and dealers not above specified ...	...		Rs.
Persons falling under any head mentioned in class I or class II, and whose annual earnings are not so large as to warrant their assessment in either of those classes.	}	First grade	5
		Second grade	2
		Third grade	1

ACT No. V OF 1878.

(Passed on 9th February 1878.)

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2. *Repeal of Act XX of 1871.*
3. *Interpretation-clause. 'Land.' 'Landholder.' 'Annual value.' 'Year.'*
4. *Rate assessable.*
5. *Power to recover a share of rate from tenant.*
6. *Rates to be credited to Local Government.*
7. *Appropriation for increasing revenue available for famine purposes. Allotment for local improvements.*
8. *Works benefiting several districts.*
9. *Unexpended portion of allotment.*
10. *Accounts to be kept.*
11. *Local Committees.*
12. *Suits under Act cognizable by Courts having cognizance of suits for rent.*
13. *Appeals.*
14. *Recovery of rates.*
15. *Supplementary powers of Local Government.*

SCHEDULE.

An Act to amend the law relating to the levy of rates on land in the Punjab.

Whereas, in order to defray the expenditure incurred and to be incurred for the relief and prevention of famine, it is necessary to make a permanent increase to the annual revenues, and it is accordingly expedient to provide, in the territories administered by the Lieutenant-Governor of the Punjab, for the levy on land of rates in addition to those now applied to local purposes; and whereas it is therefore expedient to repeal the Punjab Local Rates Act, 1871, and to re-enact it with the amendments hereinafter appearing; It is hereby enacted as follows:—

1. This Act may be called "The Punjab Local Rates Act, 1878."

It extends only to the territories for the time being administered by the Lieutenant-Governor of the Punjab;

And it shall come into force on such date as the Governor-General in Council by notification in the *Gazette of India* directs.

2. From such date the Punjab Local Rates Act, 1871, shall be repealed. But all rates imposed, sums credited to the Local Government, committees appointed and notifications published under the said Act, shall be deemed to have been respectively imposed, credited, appointed and published under this Act;

And all assignments made under the said Act shall be deemed to be allotments made under this Act.

3. In this Act—

'Land' means land assessed to the land-revenue, and includes land whereof the land-revenue has been, wholly or in part, released, compounded for, redeemed or assigned;

'Landholder' means any person responsible for the payment of the land-revenue, if any, assessed on land. It also includes a person holding land, the land-revenue of which has been, wholly or in part, released, compounded for, redeemed or assigned;

'Annual value' means—

(1) double the land-revenue for the time being assessed on any land, whether such assessment be leviable or not;

(2) and, where the land-revenue has been permanently assessed, or has been, wholly or in part, compounded for or redeemed—

double the amount which, but for such permanent assessment, composition or redemption, would have been leviable;

'Year' means the year commencing on the first day of April.

4. All land shall be liable to the payment of such rate as the Lieutenant-Governor from time to time directs, not exceeding eight pies for every rupee of its annual value.

Such rate shall be paid by the land-holder independently of, and in addition to, any land-revenue assessed on land for the land-revenue of which he is responsible, and any local cesses now leviable therefrom:

Provided that wherever the proprietors of any land pay the land-revenue in kind to any assignee of revenue or any village headman, such assignee of revenue or village headman shall be responsible for the payment of the said rate, instead of the proprietors, and no demand shall be made by any such assignee or village headman on any such proprietor in respect of the payment of any such rate.

5. Whenever a rate is charged on a landholder in respect of lands held by a tenant with a right of occupancy holding at a favourable rent, such landholder may realize from such tenant a share of the said rate, bearing the same proportion to the whole rate as the excess of the annual value over the rent paid by such tenant bears to half the annual value.

6. The proceeds of all rates imposed under this Act shall be carried to the credit of the Local Government.

7. From the sums so credited, the Lieutenant-Governor shall in each year appropriate such amount, not exceeding one-fourth of the total proceeds of the rates assessed in such year, as the Governor General in Council may direct, for the purpose of increasing the revenues available for defraying the expenditure incurred or to be incurred for the relief and prevention of famine in the said territories; or, if the Governor General in Council so directs, in any other part of British India.

Subject to such appropriation, the Lieutenant Governor shall from time to time allot from the said sums such amount as he thinks fit, to be applied in each district for expenditure on all or any of the following purposes:—

(1.) The construction, repair, and maintenance of roads and other means of communication;

(2.) The construction and repair of school-houses, the maintenance and inspection of schools, the training of teachers, and the establishment of scholarships;

(3.) The construction and repair of hospitals, dispensaries, lunatic asylums, wells and tanks, the payment of all charges connected with the purposes for which such buildings or works have been constructed, the planting and preservation of trees, and any other local works likely to promote the public health, comfort or convenience:

Provided that the amounts so allotted in any year for any district shall not in the aggregate be less than three-fourths of the proceeds of the rate assessed in such district in such year.

8. In the case of works which benefit more districts than one, the Lieutenant-Governor may determine what proportion of the expenses of the work shall be borne by each of the districts benefited thereby, and such proportion shall be payable out of the allotments made as aforesaid to such districts respectively.

9. Any portion of such allotment remaining unexpended at the end of the year in which the allotment was made may, at the discretion of the Lieutenant-Governor, be re-allotted for expenditure in the same district, or may be applied for the benefit of the Punjab, to such one or more of the purposes mentioned in the second clause of section seven as the Lieutenant-Governor from time to time directs.

10. Accounts of the receipts in respect of all rates levied under this Act and of the allotments made under section seven shall be kept in each district.

Such accounts shall, at all reasonable times, be open to the inspection of the local committee hereinafter mentioned.

An abstract of such accounts shall be prepared annually in English and in the vernacular language of the district, and shall be open, at all reasonable times, to public inspection at suitable places within the district without the payment of any fee.

An abstract of such accounts shall also be published annually in the local Gazette.

11. The Lieutenant-Governor shall appoint, in each district, a committee, consisting of not less than six persons, for the purpose of determining how the amount allotted under section seven shall be applied, and of supervising and controlling such amount:

Provided that not less than one third of the members of such committee shall be persons not in the service of Government, and owning or occupying land in the district, or residing therein:

The Lieutenant-Governor shall from time to time prescribe the manner in which the members of such committee shall be appointed or removed, and shall define the functions and authority of such committee.

12. Suits for the recovery from co-sharers, tenants or others, of any sum on account of any rate imposed under this Act, and all suits on account of illegal exaction of such rate, or for the settlement of accounts, shall be cognizable by the Courts which, for the time being, have cognizance of suits for rent due on land.

13. In matters connected with the assessment and collection of any sum leviable under this Act, an appeal shall lie from the order of any person authorized under this Act to make assessments, to such person as the Lieutenant-Governor appoints:

Provided that such appeal shall be presented within thirty days from the date of such order.

The order of such person on such appeal shall be final.

14. All sums due on account of any rate imposed under this Act shall be recoverable as if they were arrears of land-revenue due on the land on account of which the rate is payable.

15. The Lieutenant-Governor may by notification from time to time—

(a) prescribe by what instalments and at what times such rate shall be payable, and by whom it shall be assessed, collected and paid;

(b) appoint the person or class of persons to whom the appeals referred to in section thirteen shall lie;

(c) make rules consistent with this Act for the guidance of officers in matters connected with its enforcement;

(d) exempt wholly or in part any portions of the territories under his government from the operation of this Act, or exempt any land from liability to pay the whole or any part of any rate under this Act, and cancel such exemption;

(e) direct fresh measurements and vary the assessment accordingly.

Every notification under this section shall be published in the local Gazette.

ACT No. VI OF 1878.

(Passed on the 13th February 1878.)

CONTENTS.

SECTIONS.

1. *Short title. Extent. Commencement.*
2. *Repeal of enactments.*
3. *Interpretation-clause. "Treasure." "Collector." Owner.*
4. *Notice by finder of treasure.*
5. *Notification requiring claimants to appear.*
6. *Forfeiture of right on failure to appear.*
7. *Matters to be enquired into and determined by the Collector.*
8. *Time to be allowed for suit by person claiming the treasure.*
9. *When treasure may be declared ownerless. Appeal against such declaration.*
10. *Proceedings subsequent to declaration.*
11. *When no other person claims as owner of place, treasure to be given to finder.*
12. *When only one such person claims and his claim is not disputed, treasure to be divided, and shares to be delivered to parties.*
13. *In case of dispute as to ownership of place, proceedings to be stayed.*
14. *Settlement of such dispute.*
15. *and division thereupon.*
16. *Power to acquire the treasure on behalf of Government.*
17. *Decision of Collector final, and no suit to lie against him for acts done bonâ fide.*
18. *Collector to exercise powers of Civil Court.*
19. *Power to make rules.*
20. *Penalty on finder failing to give notice, &c.*
21. *Penalty on owner abetting offence under Section 20.*

SCHEDULE.

An Act to amend the law relating to Treasure Trove.

Whereas it is expedient to amend the law relating to treasure-trove; It is hereby enacted as follows:—

Preliminary.

1. This Act may be called "The Indian Treasure Trove Act, 1878;" It extends to the whole of British India; And it shall come into force at once.

2. The enactments specified in the schedule hereto annexed shall be repealed to the extent mentioned in the third column of the same schedule.

3. In this Act—

“treasure” means anything of any value hidden in the soil, or in anything affixed thereto:

“Collector” means (1) any revenue officer in independent charge of a district, and (2) any officer appointed by the Local Government to perform the functions of a Collector under this Act.

When any person is entitled, under any reservation in an instrument of transfer of any land or thing affixed thereto, to treasure in such land or thing, he shall for the purposes of this Act, be deemed to be the owner of such land or thing.

Procedure on finding Treasure.

4. Whenever any treasure exceeding in amount or value ten rupees is found, the finder shall, as soon as practicable, give to the Collector notice in writing—

(a) of the nature and amount or approximate value of such treasure;

(b) of the place in which it was found;

(c) of the date of the finding;

and either deposit the treasure in the nearest Government Treasury, or give the Collector such security as the Collector thinks fit, to produce the treasure at such time and place as he may from time to time require.

5. On receiving a notice under section four, the Collector shall, after making such enquiry (if any) as he thinks fit, take the following steps (namely):—

(a) he shall publish a notification in such manner as the Local Government from time to time prescribes in this behalf, to the effect that, on a certain date (*mentioning it*), certain treasure (*mentioning its nature, amount and approximate value*) was found in a certain place (*mentioning it*); and requiring all persons claiming the treasure, or any part thereof, to appear personally or by agent before the Collector on a day and at a place therein mentioned, such day not being earlier than four months, or later than six months, after the date of the publication of such notification;

(b) when the place in which the treasure appears to the Collector to have been found was at the date of the finding in the possession of some person other than the finder, the Collector shall also serve on such person a special notice in writing to the same effect.

6. Any person having any right to such treasure or any part thereof, as owner of the place in which it was found or otherwise, and not appearing as required by the notification issued under section five, shall forfeit such right.

7. On the day notified under section five, the Collector shall cause the treasure to be produced before him, and shall enquire as to and determine—

(a) the person by whom, the place in which, and the circumstances under which, such treasure was found; and

(b) as far as is possible the person by whom, and the circumstances under which, such treasure was hidden.

8. If, upon an enquiry made under section seven, the Collector sees reason to believe that the treasure was hidden within one hundred years before the date of the finding, by a person appearing as required by the said notification and claiming such treasure, or by some other person under whom such person claims, the Collector shall make an order adjourning the hearing of the case for such period as he deems sufficient, to allow of a suit being instituted in the Civil Court by the claimant, to establish his right.

9. If upon such enquiry the Collector sees no reason to believe that the treasure was so hidden ; or

if, where a period is fixed under section eight, no suit is instituted as aforesaid within such period to the knowledge of the Collector ; or

if such suit is instituted within such period, and the plaintiff's claim is finally rejected ;

the Collector may declare the treasure to be ownerless.

Any person aggrieved by a declaration made under this section may appeal against the same within two months from the date thereof to the Chief Controlling Revenue Authority.

Subject to such appeal, every such declaration shall be final and conclusive.

10. When a declaration has been made in respect of any treasure under section nine, such treasure shall, in accordance with the provisions hereinafter contained, either be delivered to the finder thereof, or be divided between him and the owner of the place in which it has been found in manner hereinafter provided.

11. When a declaration has been made in respect of any treasure as aforesaid, and no person other than the finder of such treasure has appeared as required by the notification published under section five and claimed a share of the treasure as owner of the place in which it has been found, the Collector shall deliver such treasure to the finder thereof.

12. When a declaration has been made as aforesaid in respect of any treasure, and only one person other than the finder of such treasure has so appeared and claimed, and the claim of such person is not disputed by the finder, the Collector shall proceed to divide the treasure between the finder and the person so claiming according to the following rule (namely) :—

If the finder and the person so claiming have not entered into any agreement then in force as to the disposal of the treasure, three-fourths of the treasure shall be allotted to such finder and the residue to such person. If such finder and such person have entered into any such agreement, the treasure shall be disposed of in accordance therewith :

Provided that the Collector may in any case, if he thinks fit, instead of dividing any treasure as directed by this section,

(a) allot to either party the whole or more than his share of such treasure, on such party paying to the Collector for the other party such sum of money as the Collector may fix as the equivalent of the share of such other party, or of the excess so allotted, as the case may be ; or

(b) sell such treasure or any portion thereof by public auction and divide the sale-proceeds between the parties according to the rule hereinbefore prescribed :

Provided also, that when the Collector has by his declaration under section nine rejected any claim made under this Act by any person other than the said finder or person claiming as owner of the place in which the treasure was found, such division shall not be made until after the expiration of two months without an appeal having been presented under section nine by the person whose claim has been so rejected, or, when an appeal has been so presented, after such appeal has been dismissed.

When the Collector has made a division under this section, he shall deliver to the parties the portions of such treasure, or the money in lieu thereof, to which they are respectively entitled under such division.

13. When a declaration has been made as aforesaid in respect of any treasure, and two or more persons have appeared as aforesaid and each of them claimed as owner of the place where such treasure was found, or the right of any person who has so appeared and claimed is disputed by the finder of such treasure, the Collector shall retain such treasure and shall make an order staying his proceedings with a view to the matter being enquired into and determined by a Civil Court.

14. Any person who has so appeared and claimed may, within one month from the date of such order, institute a suit in the Civil Court to obtain a decree declaring his right; and in every such suit the finder of the treasure and all persons disputing such claim before the Collector shall be made defendants.

15. If any such suit is instituted and the plaintiff's claim is finally established therein, the Collector shall, subject to the provisions of section twelve, divide the treasure between him and the finder.

If no such suit is instituted as aforesaid, or if the claims of the plaintiffs in all such suits are finally rejected, the Collector shall deliver the treasure to the finder.

16. The Collector may, at any time after making a declaration under section nine, and before delivering or dividing the treasure as hereinbefore provided, declare by writing under his hand his intention to acquire on behalf of the Government the treasure, or any specified portion thereof, by payment to the persons entitled thereto of a sum equal to the value of the materials of such treasure or portion, together with one-fifth of such value, and may place such sum in deposit in his treasury to the credit of such persons; and thereupon such treasure or portion shall be deemed to be the property of Government, and the money so deposited shall be dealt with, as far as may be, as if it were such treasure or portion.

17. No decision passed or act done by the Collector under this Act shall be called in question by any Civil Court, and no suit or other proceeding shall lie against him for anything done in good faith in exercise of the powers hereby conferred.

18. A Collector making any enquiry under this Act may exercise any power conferred by the Code of Civil Procedure on a Civil Court for the trial of suits.

19. The Local Government may, from time to time, make rules consistent with this Act, to regulate proceedings hereunder.

Such rules shall, on being published in the local Gazette, have the force of law.

Penalties.

20. If the finder of any treasure fails to give the notice, or does not either make the deposit or give the security, required by section four, or alters or attempts to alter such treasure so as to conceal its identity, the share of such treasure, or the money in lieu thereof to which he would otherwise be entitled, shall vest in Her Majesty,

and he shall, on conviction before a Magistrate, be punished with imprisonment for a term which may extend to one year, or with fine, or with both.

21. If the owner of the place in which any treasure is found abets, within the meaning of the Indian Penal Code, any offence under section twenty, the share of such treasure, or the money in lieu thereof to which he would otherwise be entitled, shall vest in Her Majesty,

and he shall, on conviction before a Magistrate, be punished with imprisonment which may extend to six months, or with fine, or with both.

SCHEDULE.

Number and date of enactments.	Title or subject.	Extent of repeal.
Bengal Regulation V of 1817 ...	A Regulation for declaring the rights of Government and of individuals with respect to hidden treasure, and for prescribing the rules to be observed on the discovery of such treasure.	The whole.
Madras Regulation IX of 1832 ...	A Regulation for declaring the rights of Government and of individuals with respect to hidden treasure, and for prescribing the rules to be observed on discovery of such treasure.	The whole.
Act XII of 1838 ...	Hidden Treasure (Madras).	The whole.
Act IV of 1872 ...	An Act for declaring which of certain rules, laws and regulations have the force of law in the Punjab and for other purposes.	So far as regards Bengal Regulation V of 1817.
Act XV of 1874 ...	Laws Local Extent.	The second schedule, so far as regards Madras Regulation XI of 1832 and Act XII of 1838. The fourth schedule, so far as regards Bengal Regulation V of 1817.
Act XVII of 1875 ...	An Act to consolidate and amend the law relating to the Courts in British Burma, and for other purposes.	So far as regards Bengal Regulation V of 1817.
Act XX of 1875 ...	An Act to declare and amend the law in force in the Central Provinces.	Ditto.
Act XVIII of 1876 ...	Oudh Laws Act.	Ditto.

ACT No. VII OF 1878.

*The Indian Forest Act, 1878.**(Passed on the 8th March 1878.)*

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SCHEDULE.

An Act to amend the law relating to Forests, the transit of forest-produce, and the duly leviable on timber.

Whereas it is expedient to amend the law relating to Forests, the transit of forest-produce and the duty leviable on timber ; It is hereby enacted as follows :—

CHAPTER I.—PRELIMINARY.

1. This Act may be called “The Indian Forest Act, 1878;”

It shall come into force at once in the territories respectively administered by the Governor of Bombay in Council, the Lieutenant-Governors of the Lower Provinces, the North-Western Provinces, and the Panjab, (except the District of Hazara), and the Chief Commissioners of Oudh, the Central Provinces and Assam.

And any other Local Government may from time to time, with the previous sanction of the Governor General in Council, extend, by notification in the local official Gazette, this Act to all or any of the territories for the time being under its administration.

On and from the date on which this Act comes into force in any of the said territories, the enactments mentioned in the schedule hereto annexed shall be repealed in such territories. But all rules made under or validated by any of the said enactments and in force at the date of such repeal shall, so far as they are consistent with this Act, be deemed to have been made and published hereunder.

2. In this Act, unless there be something repugnant in the subject or context,—

“Forest-officer” means any person whom the Governor General in Council, or the Local Government or any officer empowered by the Governor General in Council or the Local Government in this behalf, may from time to time appoint by name or as holding an office, to carry out all or any of the purposes of this Act or any rule made under this Act to be done by a Forest-officer :

“Tree” includes bamboos, stumps and brushwood :

“Timber” includes trees and bamboos when they have fallen or have been felled, and all wood, whether cut up, or fashioned or hollowed-out for cart-wheels, mortars, canoes or other purposes or not :

“Forest-produce” includes the following when found in, or brought from, a forest, that is to say,—

minerals (including limestone and laterite), surface soil, trees, timber, grass, peat, canes, creepers, reeds, leaves, moss, flowers, fruits, roots, juice, catechu, bark, honey, wax, lac, caoutchouc, gum, wood-oil, grass-oil, resin, varnish, silk-worms and cocoons, shells, skins, tusks, bones and horns :

“Forest-offence” means an offence punishable under this Act, or under any rule made under this Act :

“Cattle” includes elephants, camels, buffaloes, horses, mares, geldings, ponies, colts, fillies, mules, asses, pigs, rams, ewes, sheep, lambs, goats and kids :

“River” includes streams, canals, creeks and other channels, natural or artificial.

CHAPTER II.—OF RESERVED FORESTS.

3. The Local Government may from time to time constitute any forest-land or waste-land which is the property of Government, or over which the Government has proprietary rights, or to the whole or any part of the forest-produce of which the Government is entitled, a Reserved Forest in the manner hereinafter provided.

4. Whenever it is proposed to constitute any land a Reserved Forest, the Local Government may publish a notification in the local official Gazette—

(a) declaring that it is proposed to constitute such land a reserved forest ;

(b) specifying the limits of such forest ; and

(c) appointing an officer (hereinafter called “the Forest Settlement Officer”) to inquire into and determine the existence, nature and extent of any rights alleged to exist in favour of any person in or over any land comprised within such limits, or in or over any forest-produce, and to deal with the same as provided in this chapter.

Explanation 1.—For the purpose of clause (b) of this section, it shall be sufficient to describe the limits of the forest by roads, rivers, ridges or other well-known or readily intelligible boundaries.

The officer appointed under clause (c) of this section shall ordinarily be a person not holding any forest-office except that of Forest Settlement Officer.

Nothing in this section shall prevent the Local Government from appointing any number of officers not exceeding three, not more than one of whom shall be a person holding any forest-office except as aforesaid, to perform the duties of a Forest Settlement Officer under this Act.

5. During the interval between the publication of such notification and the date fixed by the notification under section nineteen, no right shall be acquired in or over the land comprised in such notification, except by succession or under a grant or contract in writing made or entered into by or on behalf of Government or some person in whom such right was vested when the former notification was issued ; and no fresh clearings for cultivation or for any other purpose shall be made in such land.

6. When a notification has been issued under section four, the Forest Settlement Officer shall publish in the language of the country, in every town and village in the neighbourhood of the land comprised therein, a proclamation—

(a) specifying the limits of the proposed forest ;

(b) explaining the consequences which, as hereinafter provided, will ensue on the reservation of such forest ; and

(c) fixing a period of not less than three months from the date of such proclamation, and requiring every person claiming any right mentioned in section four or five either to present to such officer within such period a written notice specifying, or to appear before him and state, the nature of such right and the amount and particulars of the compensation (if any) claimed in respect thereof.

7. The Forest Settlement Officer shall take down in writing all statements made under section six, and shall, at some convenient place, enquire into all claims duly preferred under that section, and the existence of any rights mentioned in section four or five and not claimed under section six, so far as the same may be ascertainable from the records of Government and the evidence of any person likely to be acquainted with the same.

8. For the purposes of such enquiry, the Forest Settlement Officer may exercise the following powers, that is to say :—

(a) power to enter, by himself or any officer authorized by him for the purpose, upon any land, and to survey, demarcate, and make a map of, the same ; and (b) the powers of a Civil Court in the trial of suits.

9. Rights in respect of which no claim has been preferred under section six, and of the existence of which no knowledge has been acquired by enquiry under section seven, shall be extinguished, unless before the notification under section nineteen is published the person claiming them satisfies the Forest Settlement Officer that he had sufficient cause for not preferring such claim within the period fixed under section six.

10. In the case of a claim to a right in or over any land, other than a right of way or pasture or to forest-produce or a watercourse, the Forest Settlement Officer shall pass an order admitting or rejecting the same in whole or in part.

If such claim is admitted in whole or in part, the Forest Settlement Officer shall either (1) exclude such land from the limits of the proposed Forest ; or (2) come to an agreement with the owner thereof for the surrender of his rights ; or (3) proceed to acquire such land in the manner provided by the Land Acquisition Act, 1870.

For the purpose of so acquiring such land—

(a) the Forest Settlement Officer shall be deemed to be a Collector proceeding under the Land Acquisition Act, 1870 ;

(b) the claimant shall be deemed to be a person interested and appearing before him in pursuance of a notice given under section nine of that Act ;

(c) the provisions of the preceding sections of that Act shall be deemed to have been complied with ; and

(d) the Collector, with the consent of the claimant, or the Court, with the consent of both parties, may award compensation in land, or partly in land and partly in money.

11. In the case of a claim to rights of pasture or to forest-produce, the Forest Settlement Officer shall pass an order admitting or rejecting the same in whole or in part.

12. The Forest Settlement Officer, when passing any order under section eleven, shall record, so far as may be practicable,—

(a) the name, father's name, caste, residence and occupation of the person claiming the right ; (b) the designation, position and area of all fields or groups of fields (if any), in respect of which the exercise of such rights is claimed,

13. If the Forest Settlement Officer admits in whole or in part any claim under section eleven, he shall also record the extent to which the claim is so admitted, specifying the number and description of the cattle which the claimant is from time to time entitled to graze in the forest, the season during which such pasture is permitted, the quantity of timber and other forest-produce which he is from time to time authorised to take or receive, or such other particulars as the case may require. He shall also record whether the timber or other forest-produce obtained by the exercise of the rights claimed may be sold or bartered.

14. After making such record, the Forest Settlement Officer shall, to the best of his ability, and having due regard to the maintenance of the Reserved Forest in respect of which the claim is made, pass such orders as will ensure the continued exercise of the rights so admitted. For this purpose, the Forest Settlement Officer may—(a) set out some other forest-tract of sufficient extent, and in a locality convenient for the purposes of such claimants, and record an order conferring upon them a right of pasture or to forest-produce (as the case may be) to the extent so admitted; or (b) so alter the limits of the proposed forest as to exclude forest-land of sufficient extent, and in a locality reasonably convenient, for the purposes of the claimants; or (c) record an order, continuing to such claimants a right of pasture or to forest-produce (as the case may be), to the extent so admitted, at such seasons, within such portions of the proposed forest and under such rules as may from time to time be prescribed by the Local Government.

15. In case the Forest Settlement Officer finds it impossible, having due regard to the maintenance of the Reserved Forest, to make such settlement under section fourteen as shall ensure the continued exercise of the said rights to the extent so admitted, he shall (subject to such rules as the Local Government may from time to time prescribe in this behalf) commute such rights, either by the payment to such persons of a sum of money in lieu thereof, or by the grant of land, or in such other manner as he thinks fit.

16. Any person who has made a claim under this Act, or any Forest-officer or other person generally or specially empowered by the Local Government in this behalf, may, within three months from the date of the order passed on such claim by the Forest Settlement Officer under section ten, eleven, fourteen or fifteen, present an appeal from such order to such officer of the Revenue Department, of rank not lower than that of a Collector or Deputy Commissioner, as the Local Government may from time to time, by notification in the local official Gazette, appoint by name, or as holding an office, to hear appeals from such orders: Provided that if the Local Government establishes (as it is hereby empowered to do) a Court (hereinafter called the Forest Court) composed of three persons to be appointed by the Local Government, such appeals shall be presented to such Court.

17. Every appeal under section sixteen shall be made by petition in writing, and may be delivered to the Forest Settlement Officer, who shall forward it without delay to the authority competent to hear the same.

If the appeal be to an officer appointed under section sixteen, it shall be heard in the manner prescribed for the time being for the hearing of appeals in matters relating to land-revenue.

If the appeal be to the Forest-Court, the Court shall fix a day and a convenient place in the neighbourhood of the proposed forest for hearing the appeal, and shall give notice thereof to the parties, and shall hear such appeal accordingly.

The order passed thereon by such officer or Court, or by the majority of the members of such Court, shall be final, subject to revision by the Local Government.

18. The Local Government, or any person who has made a claim under this Act, may appoint any person to appear, plead and act on its or his behalf before the Forest Settlement Officer, or the appellate officer or Court, in the course of any inquiry or appeal under under this Act.

19. When the following events have occurred (namely), (a) the period fixed under section six for preferring claims has elapsed, and all claims (if any) made within such period have been disposed of by the Forest Settlement Officer; and (b) if such claims have been made, and the period limited by section sixteen, for appealing from the orders passed on such claims has elapsed, and all appeals (if any) presented within such period have been disposed of by the appellate officer or Court; and (c) all lands (if any) to be included in the proposed forest, which the Forest Settlement Officer has, under section ten, elected to acquire under the Land Acquisition Act, 1870, have become vested in the Government under section sixteen of that Act, the Local Government may publish a notification in the local official Gazette, specifying definitely, according to boundary-marks erected or otherwise, the limits of the forest which it is intended to reserve, and declaring the same to be reserved from a date fixed by such notification. From the date so fixed, such forest shall be deemed to a be Reserved Forest.

20. The Forest-officer shall, before the date fixed by such notification, cause a translation thereof into the language of the country to be published in every town and village in the neighbourhood of the forest.

21. The Local Government may, within five years from the publication of any notification under section nineteen, revise any arrangement made under section fourteen or seventeen, and may, for this purpose, rescind or modify any order made under section fourteen or seventeen, and direct that any one of the proceedings specified in section fourteen be taken in lieu of any other of such proceedings, or that the rights admitted under section eleven be commuted under section fifteen.

22. No right of any description shall be acquired in or over a Reserved Forest, except by succession or under a grant or contract in writing made by or on behalf of the Government or of some person in whom such right was vested when the notification under section nineteen was issued.

23. Notwithstanding anything contained in section twenty-two, no right continued under section fourteen, clause (c), shall be alienated by way of grant, sale, lease, mortgage or otherwise, without the sanction of the Local Government: provided that when any such right is appendant to any land or house, it may be sold or otherwise alienated with such land or house. No timber or other forest-produce obtained in exercise of any such right shall be sold or bartered except to such extent as may have been admitted in the order recorded under section thirteen.

24. The Forest-officer may from time to time, with the previous sanction of the Local Government or of any officer duly authorized in that behalf, stop any public or private way or water-course in a Reserved Forest; provided, that a substitute for the way or water-course so stopped, which the Local Government deems to be reasonably convenient, already exists, or has been provided or constructed by the Forest-officer in lieu thereof.

25. Any person who—(a) makes any fresh clearing prohibited by section five, or (b) sets fire to a Reserved Forest, or kindles any fire in such manner as to endanger the same; or who, in a Reserved Forest, (c) kindles, keeps or carries any fire except at such seasons as the Forest-officer may from time to time notify in this behalf; (d) trespasses or pastures cattle or permits cattle to trespass; (e) causes any damage by negligence in felling any tree or cutting or dragging any timber; (f) fells, girdles, lops, taps or burns any tree, or strips-off the bark or leaves from, or

otherwise damages, the same; (g) quarries stone, burns lime or charcoal, or collects, subjects to any manufacturing process or removes, any forest-produce; (h) clears or breaks up any land for cultivation, or any other purpose; or, (i) in contravention of any rules which the Local Government may from time to time prescribe, kills or catches elephants, hunts, shoots, fishes, poisons water, or sets traps or snares;

shall be punished with imprisonment for a term which may extend to six months, or with fine not exceeding five hundred rupees, or with both, in addition to such compensation for damage done to the forest as the convicting Court may direct to be paid.

Nothing in this section shall be deemed to prohibit (a) any act done by permission in writing of the Forest-officer, or under any rule made by the Local Government; or (b) the exercise of any right continued under section fourteen, clause (c), or created by grant or contract in writing made by or on behalf of Government under section twenty-two.

Whenever fire is caused wilfully or by gross negligence in a Reserved Forest, the Local Government may (notwithstanding that any penalty has been inflicted under this section) direct that in such forest or any portion thereof the exercise of all rights of pasture or to forest-produce shall be suspended for such period as it thinks fit.

26. The Local Government may, with the previous sanction of the Governor-General in Council, by notification in the local official Gazette, direct that, from a date fixed by such notification, any forest or any portion thereof reserved under this Act shall cease to be a Reserved Forest. From the date so fixed, such forest or portion shall cease to be reserved; but the rights (if any) which have been extinguished therein shall not revive in consequence of such cessation.

CHAPTER III.—OF VILLAGE-FORESTS.

27. The Local Government may from time to time assign to any village-community the rights of Government to or over any land which has been constituted a Reserved Forest, and may cancel such assignment. All forests so assigned shall be called Village-forests. The Local Government may from time to time make rules for regulating the management of village-forests, prescribing the conditions under which the community to which any such assignment is made may be provided with timber or other forest-produce, or pasture, and their duties for the protection and improvement of such forest. All provisions of this Act relating to Reserved Forests shall (so far as they are consistent with the rules so made) apply to village-forests.

CHAPTER IV.—OF PROTECTED FORESTS.

28. The Local Government may from time to time, by notification in the local official Gazette, declare the provisions of this chapter applicable to any forest-land or waste-land which is not included in a Reserved Forest, but which is the property of Government, or over which the Government, has proprietary rights, or to the whole or any part of the forest-produce of which the Government is entitled.

The forest-land and waste-lands comprised in any such notification shall be called a "Protected Forest." No such notification shall be made unless the nature and extent of the rights of Government and of private persons in or over the forest-land or waste-land comprised therein have been enquired into and recorded at a survey or settlement, or in such other manner as the Local Government thinks sufficient. Every such record shall be presumed to be correct until the contrary is proved.

Provided that, if in the case of any forest-land or waste-land, the Local Government thinks that such enquiry and record are necessary, but that they will occupy

such length of time as that the rights of Government will in the meantime be endangered, the Local Government may (pending such enquiry and record) declare such land to be a protected forest, but so as not to abridge or affect any existing rights of individuals or communities.

29. The Local Government may from time to time, by notification in the local official Gazette,—

(a) declare any class of trees in a protected forest, or any trees in any such forest, to be reserved from a date fixed by such notification ;

(b) declare that a portion of such forest be closed for such term not exceeding twenty years as the Local Government thinks fit, and that the rights of private persons (if any) over such portion shall be suspended during such term: provided that the remainder of such forest be sufficient, and in a locality reasonably convenient, for the due exercise of the rights suspended in the portion so closed;

(c) prohibit, from a date fixed as aforesaid, the quarrying of stone, or the burning of lime or charcoal, or the collection or subjection to any manufacturing process, or removal, of any forest-produce, in any such forest, and the breaking up or clearing for cultivation, for building, for herding cattle or for any other purpose, any land in any such forest: and

(d) alter or cancel such declaration or prohibition.

30. The Collector or Deputy Commissioner of the district shall cause a translation into the language of the district, of every notification issued under section twenty-nine, to be affixed in a conspicuous place in every town and village in the neighbourhood of the forest comprised in the notification.

31. The Local Government may from time to time make rules to regulate the following matters:—

(a) the cutting, sawing, conversion and removal of trees and timber, and the collection, manufacture and removal of forest-produce, from protected forests ;

(b) the granting of licenses to the inhabitants of towns and villages in the vicinity of protected forests to take trees, timber or other forest-produce for their own use, and the production and return of such licenses by such persons ;

(c) the granting of licenses to persons felling or removing trees or timber or other forest-produce from such forests for the purposes of trade, and the production and return of such licenses by such persons ;

(d) the payments (if any) to be made by the persons mentioned in clauses (b) and (c) of this section, for permission to cut such trees, or to collect and remove such timber or other forest-produce ;

(e) the other payments, if any, to be made by them in respect of such trees, timber and produce, and the places where such payments shall be made ;

(f) the examination of forest-produce passing out of such forests ;

(g) the clearing and breaking up of land for cultivation or other purposes in such forests ;

(h) the protection from fire of timber lying in such forests and of trees reserved under section twenty-nine ;

(i) the cutting of grass and pasturing of cattle in such forests ;

(j) killing or catching elephants, hunting, shooting, fishing, poisoning water, and setting traps or snares in such forests ;

(k) the protection and management of any portion of a forest closed under section twenty-nine ;

(l) the exercise of rights referred to in section twenty-eight.

32. Any person who commits any of the following offences:—

(a) fells, girdles, lops, taps or burns any tree reserved under section twenty-nine, or strips off the bark or leaves from, or otherwise damages, any such tree ;

(b) contrary to any prohibition under section twenty-nine, quarries any stone, or burns any lime or charcoal, or collects, subjects to any manufacturing process, or removes, any forest-produce ;

(c) contrary to any prohibition under section twenty-nine, breaks up or clears for cultivation or any other purpose any land in any protected forest ;

(d) sets fire to such forest, or kindles a fire without taking all reasonable precautions to prevent its spreading to any trees reserved under section twenty-nine, whether standing, fallen or felled, or to any closed portion of such forest ;

(e) leaves burning any fire kindled by him in the vicinity of any such trees or closed portion ;

(f) fells any tree or drags any timber so as to damage any tree reserved as aforesaid ;

(g) permits cattle to damage any such tree ;

(h) infringes any rule made under section thirty-one ;

shall be punished with imprisonment for a term which may extend to six months, or with fine which may extend to five hundred rupees, or with both.

33. Nothing in this chapter shall be deemed to prohibit any act done with the permission in writing of the Forest-officer, or in accordance with rules made under section thirty-one, or (except as regards any portion of a forest closed under section twenty-nine) in the exercise of any right recorded under section twenty-eight.

CHAPTER V.—FORESTS UNDER CONSERVANCY ADMINISTRATION WHEN THIS ACT COMES INTO FORCE.

34. Within twelve months from the date on which this Act comes into force in the territories administered by any Local Government, such Government shall, after consideration of the rights of the Government and private persons in all forest-lands or waste-lands then under its executive control for purposes of forest conservancy, determine which of such lands (if any) can, according to justice, equity and good conscience, be classed as Reserved Forests or Protected Forests under this Act, and declare, by notification in the local official Gazette, any lands so classed to be Reserved or Protected Forests, as the case may be :

Provided that such declaration shall not affect any rights of the Government or private persons to or over any land or forest-produce in any such forest, which have, previous to the date of such declaration, been enquired into, settled and recorded in a manner which the Local Government thinks sufficient :

Provided also that if any such rights have not on such date been so enquired into, settled and recorded, the Local Government shall direct that the same shall be enquired into, settled and recorded in the manner provided by this Act for Reserved or Protected Forests, as the case may be ; and until such enquiry, settlement and record have been completed, no such declaration shall abridge or affect such rights.

CHAPTER VI.—OF THE CONTROL OVER FORESTS AND LANDS NOT BEING THE PROPERTY OF GOVERNMENT.

35. The Local Government may from time to time, by notification in the local official Gazette, regulate or prohibit in any forest or waste-land—(a) the breaking up or clearing of land for cultivation ; (b) the pasturing of cattle ; (c) the firing or clearing of the vegetation ; when such regulation or prohibition appears necessary for any of the following purposes :—

First.—For protection against storms, winds, rolling stones, floods and avalanches ;

Second.—For the preservation of the soil on the ridges and slopes, and in the valleys, of hilly tracts, the prevention of landslips and of the formation of ravines

and torrents, and the protection of land against erosion, or the deposit thereon of sand, stones or gravel ;

Third.—For the maintenance of a water-supply in springs, rivers and tanks ;

Fourth.—For the protection of roads, bridges, railways and other lines of communication ;

Fifth.—For the preservation of the public health ;

and may alter or cancel such notification.

The Local Government may, for any such purpose, construct at its own expense, in or upon any forest or waste-land, such work as it thinks fit ;

Provided that no such notification shall be made or work begun until after the issue of a notice to the owner of such forest or land, calling on him to shew cause, within a reasonable period to be specified in such notice, why such notification should not be made or work constructed, and until his objections (if any) and any evidence he may produce in support of the same have been heard by an officer duly appointed in that behalf, and have been considered by the Local Government.

36. In case of neglect of, or wilful disobedience to, any regulation or prohibition under section thirty-five, or if the purposes of any work to be constructed under that section so require, the Local Government may, after notice in writing to the owner of such forest or land, and after considering his objections (if any), place the same under the control of a Forest-officer, and may declare that all or any of the provisions of this Act relating to Reserved Forests shall apply to such forest or land.

The nett profits (if any) arising from the management of such forest or land shall be paid to the said proprietor.

37. In any case under this chapter in which the Local Government considers that, in lieu of placing the forest or land under the control of a Forest-officer, the same should be acquired for public purposes, the Local Government may proceed to acquire it in the manner prescribed by the Land Acquisition Act, 1870.

The owner of any forest or land comprised in any notification under section thirty-five may, at any time not less than or more than twelve years from the date thereof, require that such forest or land shall be acquired for public purposes, and the Local Government shall acquire such forest or land accordingly.

38. The owner of any land or, if there be more than one owner thereof, the owners of shares therein amounting in the aggregate to at least two-thirds thereof may, with a view to the formation or conservation of forests thereon, represent in writing to the Collector or Deputy Commissioner their desire—

(a) that such land be managed on their behalf by the Forest-officer as a Reserved or a Protected Forest on such terms as may be mutually agreed upon ; or

(b) that all or any of the provisions of this Act be applied to such land.

In either case, the Local Government may, by notification in the local official Gazette, apply to such land such provisions of this Act as it thinks suitable to the circumstances thereof and as may be desired by the applicants.

Any such notification may be altered or cancelled by a like notification.

CHAPTER VII.—OF THE DUTY ON TIMBER.

39. The Local Government, with the previous sanction of the Governor General in Council, may levy a duty in such manner, at such places, and at such rates, as it may from time to time prescribe by notification in the local official Gazette on all timber—(a) which is produced in British India, and in respect of

which the Government has any right; (b) which is brought from any place beyond the frontier of British India.

In every case in which such duty is directed to be levied *ad valorem*, the Local Government may, with the like sanction, from time to time fix, by like notification, the value on which such duty shall be assessed.

All duties on timber, which, at the time when this Act comes into force in any territory, are levied therein under the authority of the Local Government, shall be deemed to be and to have been duly levied under the provisions of this Act.

40. Nothing in this chapter shall be deemed to limit the amount (if any) chargeable as purchase-money or royalty on any timber or other forest-produce, although the same is levied on such timber or produce while in transit, in the same manner as duty is levied.

CHAPTER VIII.—OF THE CONTROL OF TIMBER AND OTHER FOREST-PRODUCE IN TRANSIT.

41. The control of all rivers and their banks as regards the floating of timber as well as the control of all timber and other forest-produce in transit by land or water, is vested in the Local Government, and it may from time to time make rules to regulate the transit of all timber and other forest-produce.

Such rules may (among other matters)—

(a) prescribe the routes by which alone timber and other forest-produce may be imported, exported or moved, into, from, or within, British India;

(b) prohibit the import and export or moving of such timber or other produce without a pass from an officer duly authorized to issue the same, or otherwise than in accordance with the conditions of such pass;

(c) provide for the issue, production and return of such passes and for the payment of fees therefor;

(d) provide for the stoppage, reporting, examination and marking of timber or other forest-produce in transit, in respect of which there is reason to believe that any money is payable to Government on account of the price thereof, or on account of any duty, fee, royalty or charge due thereon, or to which it is desirable for the purposes of this Act to affix a mark;

(e) provide for the establishment and regulation of dépôts to which such timber or other produce shall be taken by those in charge of it for examination, or for the payment of such money, or in order that such marks may be affixed to it; and the conditions under which such timber or other produce shall be brought to, stored at, and removed from, such dépôt;

(f) prohibit the closing up or obstructing of the channel or banks of any river used for the transit of timber or other forest-produce, and the throwing of grass, brushwood, branches and leaves into any such river, or any act which may cause such river to be closed or obstructed;

(g) provide for the prevention and removal of any obstruction of the channel or banks of any such river, and for recovering the cost of such prevention or removal from the person whose acts or negligence necessitated the same;

(h) prohibit absolutely or subject to conditions, within specified local limits, the establishment of saw-pits, the converting, cutting, burning, concealing or marking of timber, the altering or effacing of any marks on the same, and the possession or carrying of marking-hammers or other implements used for marking timber;

(i) regulate the use of property-marks for timber, and the registration of such marks; prescribe the time for which such registration shall hold good; limit the number of such marks that may be registered by any one person, and provide for the levy of fees for such registration.

42. The Local Government may by such rules prescribe as penalties for the infringement thereof imprisonment for a term which may extend to six months, or fine which may extend to five hundred rupees, or both.

Double penalties may be inflicted in cases where the offence is committed after sunset and before sunrise, or after preparation for resistance to lawful authority, or if the offender has been previously convicted of a like offence.

43. The Government shall not be responsible for any loss or damage which may occur in respect of any timber or other forest-produce while at a dépôt established under a rule made under section forty-one, or while detained elsewhere for the purposes of this Act; and no Forest-officer shall be responsible for any such loss or damage unless he causes such loss or damage negligently, maliciously or fraudulently.

44. In case of any accident or emergency involving danger to any property at any such dépôt, every person employed at such dépôt, whether by the Government or by any private person, shall render assistance to any Forest-officer or Police-officer demanding his aid in averting such danger and securing such property from damage or loss.

CHAPTER IX.—OF THE COLLECTION OF DRIFT AND STRANDED TIMBER.

45. All timber found adrift, beached, stranded, or sunk;

all wood or timber bearing marks which have not been registered under section forty-one, or on which the marks have been obliterated, altered or defaced by fire or otherwise, and,

in such areas as the Local Government directs, all unmarked wood and timber, shall be deemed to be the property of Government unless and until any person establishes his right and title thereto, as provided in this chapter.

Such timber may be collected by any Forest-officer or other person entitled to collect the same by virtue of any rule made under section fifty-one, and may be brought to such dépôts as the Forest-officer may from time to time notify as dépôts for the reception of drift-timber.

The Local Government may, by notification in the local official Gazette, exempt any class of timber from the provisions of this section, and withdraw such exemption.

46. Public notice shall from time to time be given by the Forest-officer, of timber collected under section forty-five. Such notice shall contain a description of the timber, and shall require any person claiming the same to present to such officer, within a period not less than two months from the date of such notice, a written statement of such claim.

47. When any such statement is presented as aforesaid, the Forest-officer may, after making such enquiry as he thinks fit, either reject the claim after recording his reasons for so doing, or deliver the timber to the claimant.

If such timber is claimed by more than one person, the Forest-officer may either deliver the same to any of such persons whom he deems entitled thereto, or may refer the claimants to the Civil Courts, and retain the timber pending the receipt of an order from such Court for its disposal.

Any person whose claim has been rejected under this section may, within two months from the date of such rejection, institute a suit to recover possession of the timber claimed by him; but no person shall recover any compensation or costs against the Government, or against any Forest-officer, on account of such rejection,

or the detention or removal of any timber, or the delivery thereof to any other person under this section. No such timber shall be subject to process of any Civil, Criminal, or Revenue Court until it has been delivered, or a suit has been brought, as provided in this section.

48. If no such statement is presented as aforesaid, or if the claimant omits to prefer his claim in the manner and within the period prescribed by the notice issued under section forty-six, or, on such claim having been so preferred by him and having been rejected, omits to institute a suit to recover possession of such timber within the further period limited by section forty-seven, the ownership of such timber shall vest in the Government, or when such timber has been delivered to another person under section forty-seven, in such other person, free from all encumbrances.

49. The Government shall not be responsible for any loss or damage which may occur in respect of any timber collected under section forty-five, and no Forest-officer shall be responsible for any such loss or damage, unless he causes such loss or damage negligently, maliciously or fraudulently.

50. No person shall be entitled to recover possession of any timber collected or delivered as aforesaid until he has paid to the Forest-officer or other person entitled to receive it such sum on account thereof as may be due under any rule made in pursuance of section forty-one.

51. The Local Government may from time to time make rules to regulate the following matters (namely):—

(a) the salving, collection and disposal of all timber mentioned in section forty-five; (b) the use and registration of boats used in salving and collecting timber; (c) the amounts to be paid for salving, collecting, moving, storing and disposing of such timber; (d) the use and registration of hammers and other instruments to be used for marking such timber.

The Local Government may from time to time prescribe, as penalties for the infringement of any rules made under this section, imprisonment for a term which may extend to six months, or fine which may extend to five hundred rupees, or both.

CHAPTER X.—PENALTIES AND PROCEDURE.

52. When there is reason to believe that a forest-offence has been committed in respect of any forest-produce, such produce, together with all tools, boats, carts and cattle used in committing such offence, may be seized by any Forest-officer or Police-officer.

Every officer seizing any property under this section shall place on such property a mark indicating that the same has been so seized, and shall, as soon as may be, make a report of such seizure to the Magistrate having jurisdiction to try the offence on account of which the seizure has been made:

Provided that when the forest-produce with respect to which such offence is believed to have been committed is the property of Government and the offender is unknown, it shall be sufficient if the officer makes, as soon as may be, a report of the circumstances to his official superior.

53. Upon the receipt of any such report the Magistrate shall, with all convenient dispatch, take such measures as may be necessary for the arrest and trial of the offender and the disposal of the property according to law.

54. All timber or forest-produce which is not the property of Government and in respect of which a forest-offence has been committed, and all tools, boats, carts and cattle used in committing any forest-offence, shall be liable to confiscation.

Such confiscation may be in addition to any other punishment prescribed for such offence.

55. When the trial of any forest-offence is concluded, any forest-produce in respect of which such offence has been committed shall, if it is the property of Government or has been confiscated, be taken charge of by a Forest-officer, and in any other case may be disposed of in such manner as the Court may direct.

56. When the offender is not known, or cannot be found, the Magistrate may, if he finds that an offence has been committed, order the property in respect of which the offence has been committed to be confiscated and taken charge of by the Forest-officer, or to be made over to the person whom he deems to be entitled to the same :

Provided that no such order shall be made until the expiration of one month from the date of seizing such property, or without hearing the person (if any) claiming any right thereto, and the evidence (if any) which he may produce in support of his claim.

57. The Magistrate may, notwithstanding anything hereinbefore contained, direct the sale of any property seized under section fifty-two and subject to speedy and natural decay, and may deal with the proceeds as he would have dealt with such property if it had not been sold.

58. The officer who made the seizure under section fifty-two or any of his official superiors, or any person claiming to be interested in the property so seized, may, within one month from the date of any order passed under section fifty-four, fifty-five or fifty-six, appeal therefrom to the Court to which orders made by such Magistrate are ordinarily appealable, and the order passed on such appeal shall be final.

59. When an order for the confiscation of any property has been passed under section fifty-four or fifty-six, as the case may be, and the period limited by section fifty-eight for an appeal from such order has elapsed and no such appeal has been preferred, or when, on such an appeal being preferred, the Appellate Court confirms such order in respect of the whole or a portion of such property, such property or such portion thereof, as the case may be, shall vest in the Government free from all incumbrances.

60. Nothing hereinbefore contained shall be deemed to prevent any officer empowered in this behalf by the Local Government from directing at any time the immediate release of any property seized under section fifty-two.

61. Any Forest-officer or Police-officer who vexatiously and unnecessarily seizes any property on pretence of seizing property liable to confiscation under this Act, shall be punished with imprisonment for a term which may extend to six months, or with fine which may extend to five hundred rupees, or with both.

62. Whoever, with intent to cause damage or injury to the public or to any person, or to cause wrongful gain as defined in the Indian Penal Code,—

(a) knowingly counterfeits upon any timber or standing tree a mark used by Forest-officers to indicate that such timber or tree is the property of the Government or of some person, or that it may lawfully be cut or removed by some person ; or

(b) alters, defaces or obliterates any such mark placed on a tree or on timber by or under the authority of a Forest-officer ; or

(c) alters, moves, destroys or defaces any boundary-mark of any forest or waste-land to which the provisions of this Act are applied,

shall be punished with imprisonment for a term which may extend to two years, or with fine, or with both.

63. Any Forest-officer or Police-officer may, without orders from a Magistrate and without a warrant, arrest any person against whom a reasonable suspicion exists of his having been concerned in any forest-offence punishable with imprisonment for one month or upwards. Every officer making an arrest under this section shall without unnecessary delay take or send the person arrested before the Magistrate having jurisdiction in the case. Nothing in this section shall be deemed to authorize such arrest for any act which is an offence under chapter IV of this Act, unless such act has been prohibited under section twenty-nine, clause (c).

64. Every Forest-officer and Police-officer shall prevent, and may interfere for the purpose of preventing, the commission of any forest-offence.

65. The Magistrate of the District, and any Magistrate of the first class specially empowered in this behalf by the Local Government, may try summarily, under the Code of Criminal Procedure, any forest-offence punishable only with imprisonment for a term not exceeding six months, or fine not exceeding five hundred rupees, or both.

66. Nothing in this Act shall be deemed to prevent any person from being prosecuted under any other law for any act or omission which constitutes an offence against this Act or the rules made under it, or from being liable under such other law to any higher punishment or penalty than that provided by the rules made under this Act: Provided that no person shall be punished twice for the same offence.

67. The Local Government may from time to time, by notification in the local official Gazette, empower any Forest-officer by name, or as holding an office, to accept from any person against whom a reasonable suspicion exists that he has committed any forest-offence other than an offence under section sixty-one or section sixty-two a sum of money by way of compensation for any damage which may have been committed, and to release any property which has been seized as liable to confiscation on payment of the value thereof as estimated by such officer.

On the payment of such sum of money or such value or both as the case may be to such officer, the accused person, if in custody, shall be discharged, the property seized shall be released, and no further proceedings shall be taken under this Act against such person or property; but nothing herein contained shall exempt such person from prosecution on the same facts under any other law for the time being in force.

68. When in any proceedings taken under this Act, or in consequence of anything done under this Act, a question arises as to whether any forest-produce is the property of the Government, such produce shall be presumed to be the property of the Government until the contrary is proved.

CHAPTER XI.—CATTLE-TRESPASS.

69. Cattle trespassing in a Reserved Forest, or in any portion of a Protected Forest which has been lawfully closed to grazing, shall be deemed to be cattle doing damage to a public plantation within the meaning of the eleventh section of the Cattle-trespass Act, 1871, and may be seized and impounded as such by any Forest-officer or Police-officer.

70. The Local Government may from time to time, by notification in the local official Gazette, direct that, in lieu of the fines fixed by the twelfth section of the Act, last aforesaid, there shall be levied for each head of cattle impounded under section sixty-nine of this Act, such fines as it thinks fit, but not exceeding the following, that is to say:—

For each elephant	...	...	...	...	...	ten rupees.
For each buffalo or camel	...	...	...	...	...	two "
For each horse, mare, gelding, pony, colt, filly, mule, bull, bullock,	...	...	...	...	...	one rupee.
cow or heifer	...	...	...	...	...	...
For each calf, ass, pig, ram, ewe, sheep, lamb, goat or kid	...	...	...	...	...	eight annas,

CHAPTER XII.—OF FOREST-OFFICERS.

71. The Local Government may invest any Forest-officer by name, or as holding an office, with the following powers, that is to say :—(a) power to enter upon any land and to survey, demarcate, and make a map of the same;—(b) the powers of a Civil Court to compel the attendance of witnesses and the production of documents ; (c) power to issue a search-warrant under the Code of Criminal Procedure ; (d) power to hold an enquiry into forest-offences, and, in the course of such enquiry, to receive and record evidence.

Any evidence recorded under clause (d) of this section shall be admissible in any subsequent trial before a Magistrate, provided that it has been taken in the presence of the accused person.

72. All Forest officers shall be deemed to be public servants within the meaning of the Indian Penal Code.

73. No suit shall lie against any public servant for anything done by him in good faith under this Act.

74. Except with the permission in writing of the Local Government, no Forest-officer shall, as principal or agent, trade in timber or other forest-produce, or be or become interested in any lease of any forest or in any contract for working any forest, whether in British or Foreign territory.

CHAPTER XIII.—SUBSIDIARY RULES.

75. The Local Government may from time to time make rules—(a) to prescribe and limit the powers and duties of any Forest-officer under this Act ; (b) to regulate the rewards to be paid to officers and informers out of the proceeds of fines and confiscations under this Act ; (c) for the preservation, reproduction and disposal of trees and timber belonging to Government, but grown on lands belonging to or in the occupation of private persons ; and (d) generally to carry out the provisions of this Act.

76. Any person breaking any rule under this Act, for the breach of which no special penalty is provided, shall be punished with imprisonment for a term which may extend to one month, or fine which may extend to five hundred rupees, or both.

77. All rules made by the Local Government under this Act shall be published in the local official Gazette, and shall thereupon, so far as they are consistent with this Act, have the force of law : Provided that no rule made under section twenty-seven, thirty-one or forty-one shall be so published without the previous sanction of the Governor-General in Council.

CHAPTER XIV.—MISCELLANEOUS.

78. Every person who exercises any right in a Reserved or Protected Forest, or who is permitted to take any forest-produce from, or to cut and remove timber or to pasture cattle in, such forest, and

every person who is employed by any such person in such forest, and

every person in any village contiguous to such forest who is employed by the Government, or who receives emoluments from the Government for services to be performed to the community,

shall be bound to furnish without unnecessary delay to the nearest Forest-officer or Police-officer any information he may possess respecting the commission of, or intention to commit, any forest-offence, and shall assist any Forest-officer or Police-officer demanding his aid (a) in extinguishing any fire occurring in such forest ; (b) in preventing any fire which may occur in the vicinity of such forest from spreading to such forest ; (c) in preventing the commission in such forest of any forest-offence ; and (d) when there is reason to believe that any such offence has been committed in such forest, in discovering and arresting the offender.

79. If the Government and any person be jointly interested in any forest or waste-land, or in the whole or any part of the produce thereof, the Local Government may from time to time either (a) undertake the management of such forest, waste-land or produce, accounting to such person for his interest in the same; or (b) issue such regulations for the management of the forest, waste-land or produce by the person so jointly interested as it deems necessary for the management thereof and the interests of all parties therein.

When the Local Government undertakes, under clause (a) of this section the management of any forest, waste-land or produce, it may from time to time, by notification in the local official Gazette, declare that any of the provisions contained in Chapters II and IV of this Act shall apply to such forest, waste-land or produce, and thereupon such provisions shall apply accordingly.

80. If any person be entitled to a share in the produce of any forest which is the property of Government or over which the Government has proprietary rights, or to any part of the forest-produce of which the Government is entitled, upon the condition of duly performing any service connected with such forest, such share shall be liable to confiscation in the event of the fact being established to the satisfaction of the Local Government that such service is no longer so performed: Provided that no such share shall be confiscated until the person entitled thereto, and the evidence (if any) which he may produce in proof of the due performance of such service, have been heard by an officer duly appointed in that behalf by the Local Government.

81. All money payable to the Government under this Act, or under any rule made under this Act, or on account of the price of any forest-produce, or of expenses incurred in the execution of this Act in respect of such produce, may, if not paid when due, be recovered under the law for the time being in force as if it were an arrear of land-revenue.

82. When any such money is payable for or in respect of any forest-produce the amount thereof shall be deemed to be a first charge on such produce, and such produce may be taken possession of by a Forest-officer until such amount has been paid.

If such amount is not paid when due, the Forest-officer may sell such produce by public auction, and the proceeds of the sale shall be applied first in discharging such amount. The surplus (if any), if not claimed within two months from the date of the sale by the person entitled thereto, shall be forfeited to Her Majesty.

83. Whenever it appears to the Local Government that any land is required for any of the purposes of this Act, such land shall be deemed to be needed for a public purpose within the meaning of the Land Acquisition Act, 1870, section four.

SCHEDULE.

(See section 1.)

ENACTMENTS REPEALED.

Number and year of Act or Regulation.	Title.	Extent of Repeal.
Act VII of 1865 ...	An Act to give effect to Rules for the management and preservation of Government forests.	So much as has not been repealed.
Act VII of 1869 ...	An Act to give validity to certain Rules relating to forests in British Burma.	The whole.
Act XIII of 1873 ...	An Act to amend the law relating to timber floated down the rivers of British Burma.	So much as has not been repealed.
Regulation IX of 1874 ...	The Arakan Hill District Laws Regulations, 1874. ...	So far as it relates to Act VII of 1865 and VII of 1869.

ACT No. VIII OF 1878.

*Sea Customs Act, 1878.**(Passed on the 8th March 1878.)*

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44. For refusing to open private warehouse when duly required.
45. For neglecting to stow goods properly in warehouse.
46. For importer or owner of warehoused goods clandestinely gaining access.
47. For opening or altering warehoused goods.
48. For deficiencies in contravention of section 98 or 100 of goods in a private warehouse.
49. For failing to produce goods when required.
50. For concealing, removing, abstracting or transferring from one package to another goods duly warehoused.
51. For excess, in private warehouse, over registered quantity.
52. For removing warehoused goods improperly.
53. For taking goods out of warehouse without paying duty.
54. For infringing rules or orders regarding transhipment.
55. For shipping goods before entry outwards.
56. For shipping goods not in shipping bill.
57. For not giving notice of short shipping or relanding as required by section 140.
58. For landing at place other than that for which goods have been cleared.
59. For deficiency in goods on which drawback has been paid on board vessel referred to in section 142.

SECTIONS.

60. For irregularly re-landing spirituous liquors.
61. For contravening rules relating to spirit.
62. For contravention of rules made under section 157.
63. For, contrary to such rules, touching at Foreign Port or not declaring in writing that vessel touched at Foreign Port.
64. For non-compliance with section 158, 159 or 160.
65. For failure to produce certificate.
66. For Master of coasting vessel violating any conditions of general pass.
67. For contravention of the provisions of section 165.
68. For dutiable goods entered in cargo-book not being found, or for not entering.
69. For failure to keep cargo-book correctly, &c.
70. For breach in respect of lading, carrying coastwise, and unlading.
71. For refusal to produce documents,
72. For making false declaration, destroying or refusing to produce document, or refusing to answer questions.
73. For possession of smuggled goods.
74. For searching persons on insufficient grounds.
75. For Customs-officers guilty of breach of duty.
76. For Customs-officers committing or conniving at frauds against Customs-revenue.
77. For neglect of Police-officer to give notice.
78. Punishment for obstruction to Customs-officers.
79. For Customs-officer disclosing particulars learnt officially concerning goods or showing or parting with samples.
80. For acting as agent without authority.
168. *Packages and contents included in confiscation of goods. Also conveyances and animals used in removal. Tackle, &c., included in confiscation of vessels.*

CHAPTER XVII.—PROCEDURE RELATING TO OFFENCES, APPEALS, &c.

169. *Power to search on reasonable suspicion.*
170. *Persons may, before search, require to be taken before Magistrate or Customs-collector.*
171. *Power to stop vessels, carts, &c., and search for goods on reasonable suspicion.*
172. *Power to issue search-warrants.*
173. *Persons reasonably suspected may be arrested.*
174. *Persons arrested to be taken to nearest Magistrate or Customs-collector.*
175. *Persons taken before Magistrate may be detained or admitted to bail.*
176. *Person escaping may be afterwards arrested.*
177. *Persons in Her Majesty's Navy, when arrested, to be secured on board until warrant procured.*
178. *Seizure of things liable to confiscation.*
179. *Things seized how dealt with.*
180. *Procedure in respect of things seized on suspicion.*
181. *When seizure or arrest is made, reason in writing to be given.*
182. *Adjudication of confiscations and penalties.*
183. *Option to pay fine in lieu of confiscation.*
184. *On confiscation of vessel or goods, property to vest in Her Majesty.*
185. *Levy of penalty for failure to bring-to.*
186. *Penalty under Act not to interfere with punishment under other law.*
187. *Offences not specially provided for how tried.*
188. *Appeal from subordinate to Chief Customs-Authority.*
189. *Deposit pending appeal of duty demanded.*
190. *Power to remit penalty or confiscation*
191. *Revision by Local Government.*
192. *Goods on which penalty incurred not to be removed till payment. Other goods of person liable to fine or penalty may be detained.*
193. *Enforcement of payment of penalty.*

CHAPTER XVIII.—MISCELLANEOUS.

SECTIONS.

194. *Power to open packages and examine goods.*
195. *Power to take samples of goods.*
196. *Owner to pay expense incidental to compliance with Customs-law.*
197. *No compensation for loss or injury except on proof of neglect or wilful act.*
198. *Notice of proceedings. Limitation.*
199. *Wharfage-fees.*
200. *Duplicates of documents may be granted on payment of fee.*
201. *Amendment of documents.*
202. *Custom-house agents.*
203. *Agent to produce authority if required.*
204. *Rules to be notified.*
205. *Cancellation of notifications.*
206. *Remission of duty and compensation to owner in certain cases.*
207. *Saving of Calcutta Port Commissioners' and Bombay Port Trust Acts.*

SCHEDULE.

PART I.—ACTS REPEALED.

PART II.—FORMS.

- A. *Form of Bond for Import-duty.*
- B. *Form of Bonded Warehouse-warrant.*
- C. *Form of Bond for removal of Spirit from licensed Distillery.*

An Act to consolidate and amend the law relating to the levy of Sea Customs-duties.

Whereas it is expedient to consolidate and amend the law relating to the levy of Sea Customs-duties; It is enacted as follows:—

CHAPTER I.—PRELIMINARY.

1. This Act may be called “The Sea Customs Act, 1878 :”

It extends to the whole of British India, and shall come into force on the first day of April 1878.

2. The Acts mentioned in the first schedule hereto annexed are repealed to the extent specified therein.

All references to any of the said Acts, in Acts passed subsequently thereto, shall be read as if made to the corresponding provisions of this Act.

All appointments, rules, declarations, exemptions and delegations made, powers conferred, forms and conditions prescribed, values, fees, rates, and periods fixed, and notifications, instructions, directions, prohibitions, passes and licenses issued, under any Act hereby repealed shall, if the same are in force at the time this Act comes into force, be deemed to have been respectively made, conferred, prescribed, fixed and issued under this Act, in so far as they are consistent herewith.

3. In this Act, unless there be something repugnant in the subject or context—(a) “Chief Customs-Authority” denotes the person authorized to exercise, subject to the Local Government, the chief control in matters relating to Sea-customs in any place in which this Act operates : (b) “Chief Customs-Officer” denotes the Chief Executive Officer of Sea-customs for any Port to which this Act applies : (c) “Customs-collector” includes every officer of Customs for the time being in separate charge of a Custom-house, or duly authorized to perform all, or any special,

duties of an officer so in charge: (d) "Customs-port" means any place except Aden declared under Section 11 to be a Port for the shipment and landing of goods: (e) "Foreign Port" means Aden and any place beyond the limits of British India: (f) "Vessel" includes anything made for the conveyance by water of human beings or property: (g) "Coasting vessel" denotes any vessel proceeding from one Customs-port to another Customs-port, whether touching at any intermediate Foreign port or not: or proceeding from or to a Customs-port to or from a place declared to be a port under section 12: (h) "Master" when used in relation to any vessel means any person, except a Pilot or Harbour Master, having command or charge of such vessel: (i) "Warehousing port" means any Customs-port declared under section 14 to be a warehousing port: (j) "Warehouse" denotes any place appointed or licensed under section 15 or section 16.

4. When any person is expressly or impliedly authorized by the owner of any goods to be his agent in respect of such goods for all or any of the purposes of this Act, and such authorization is approved by the Customs-collector, such person shall, for such purposes, be deemed to be the owner of such goods.

5. Anything which a Master is required or empowered to do under this Act may, with the express or implied consent of such Master and the approval of the Customs-collector, be done by a ship's agent.

CHAPTER II.—APPOINTMENT AND POWERS OF OFFICERS, &c.

6. The Local Government of every place in which duties of Sea-customs are leviable, may appoint such persons as it thinks fit to be officers of Customs, and to exercise the powers conferred, and to perform the duties imposed, by this Act on such officers. Every person so appointed may be suspended or dismissed by the Local Government which appointed him.

7. The Local Government may delegate to any officer of Customs any of the powers vested in it by the first clause of section 6. Every person appointed in exercise of such delegated power may be suspended or dismissed by the officer who appointed him.

8. At any place for which there is no Custom-house, the Collector of the District and the officers subordinate to him shall, unless the Local Government otherwise directs, perform all duties imposed by this Act on a Customs-collector and other officers of Customs.

9. The chief Customs-Authority may from time to time, with the sanction of the Local Government, make rules consistent with this Act (a) prescribing and limiting the powers and duties of officers of Customs, (b) regulating the delegation of their duties by such officers; and (c) generally to carry out the provisions of this Act.

10. No chief Customs-Authority or chief Customs-Officer, and no other officer of Customs whom such chief Authority or chief Officer deems it necessary to exempt on grounds of public duty, shall be compelled to serve on any jury or inquest, or as an assessor.

CHAPTER III.—APPOINTMENT OF PORTS, WHARVES, CUSTOM-HOUSES, WAREHOUSES AND BOARDING AND LANDING-STATIONS.

11. The Local Government may from time to time, by notification in the official Gazette, (a) declare the places within the territories administered by it which alone shall be Ports for the shipment and landing of goods; (b) declare the limits of such Ports; (c) appoint proper places therein to be Wharves for the landing and

shipping of goods, or of particular classes of goods; (d) declare the limits of any such Wharf; (e) alter the name of any such Port or Wharf; and (f) declare what shall, for the purposes of this Act, be deemed to be a Customs-house, and the limits thereof.

12. The Local Government may also from time to time in like manner declare places to be Ports for the carrying on of coasting trade with Customs-ports, or with any specified Customs-port, and for no other purpose.

13. The Governor General in Council may from time to time direct, by notification in the *Gazette of India*, that all goods or any specified class of goods imported from or exported to any Foreign Port to or from a Customs-port shall, with such limitations and on such conditions (if any) as he thinks fit, be treated for any of the purposes of this Act as goods imported from or exported to a Customs-port as the case may be.

14. The Local Government may from time to time declare, by notification in the official Gazette, that any Customs-port shall be a Warehousing Port for the purposes of this Act.

15. At any Warehousing Port, the chief Customs-Authority may from time to time appoint public warehouses wherein dutiable goods may be deposited without payment of duty on the first importation thereof, and may cancel such appointment.

16. At any Warehousing Port, the chief Customs-Officer may from time to time license private warehouses wherein dutiable goods may be deposited as aforesaid.

Every application for a license for a private warehouse shall be in writing, and shall be drawn up in such form as is from time to time prescribed by the chief Customs-Authority, and shall be signed by the applicant. Every license granted under this section may be cancelled on conviction of the licensee of any offence under this Act relating to warehouses, unless it is otherwise provided in the license, or on the expiration of one month's notice in writing given to the licensee by the chief Customs-Officer.

17. The chief Customs-Authority may from time to time appoint, in or near any Customs-port, stations or limits at or within which vessels arriving at, or departing from, such Port shall bring to for the boarding or landing of officers of Customs, and may, unless separate provision therefor has been made under the Indian Ports Act, 1875, direct at what particular place in any such Port vessels, not brought into Port by pilots, shall anchor or moor.

CHAPTER IV.—PROHIBITION AND RESTRICTIONS OF IMPORTATION AND EXPORTATION.

18. No goods specified in the following clauses shall be brought, whether by land or sea, into British India:—

(a) any book printed in infringement of any law in force in British India on the subject of copyright, when the proprietor of such copyright, or his agent, has given to the chief Customs-Authority a notice in writing that such copyright subsists, and a statement of the date on which it will expire:

(b) counterfeit coin: or coin which purports to be Queen's coin of India, or to be coin made under the Native Coinage Act, 1876, but which is not of the established standard in weight or fineness:

(c) any obscene book, pamphlet, paper, drawing, painting, representation, figure or article:

(d) articles bearing any names, brands or marks being, or purporting to be, the names, brands or marks of manufacturers resident in the United Kingdom or British India, and not made by such manufacturers.

19. The Governor General in Council may from time to time, by notification in the *Gazette of India*, prohibit or restrict the bringing or taking by sea or by land goods of any specified description into or out of British India or any specified part of British India.

CHAPTER V.—LEVY OF, AND EXEMPTION FROM, CUSTOMS-DUTIES.

20. Except as hereinafter provided, Customs-duties shall be levied at such rates as may be prescribed by or under any law for the time being in force, on—

(a) goods imported or exported by sea into or from any Customs-port from or to any Foreign port;

(b) opium, salt or salted fish imported by sea from any Customs-port into any other Customs-port;

(c) goods brought from any Foreign port to any Customs-port, and without payment of duty, there transhipped for, or thence carried to, and imported at any other Customs-port; and

(d) goods brought in bond from one Customs-port to another:

Provided that no such duties shall be levied on goods belonging to the Government.

21. Except as otherwise expressly provided by any law for the time being in force, goods whereof any article liable to duty under this Act forms a part or ingredient shall be chargeable with the full duty which would be payable on such goods if they were entirely composed of such article, or if composed of more than one article liable to duty then with the full duty which would be payable on such goods if they were entirely composed of the article charged with the highest rate of duty.

22. The Governor General in Council may from time to time, by notification in the *Gazette of India*, fix, for the purpose of levying duties, tariff-values of any goods exported or imported by sea on which Customs-duties are by law imposed, and alter any such values fixed by any Tariff Act for the time being in force.

23. The Governor-General in Council may from time to time, by notification in the *Gazette of India*, exempt any goods imported into, or exported from, British India, or into or from any specified port therein, from the whole or any part of the Customs-duties leviable on such goods.

The Local Government may, by special order in each case, exempt from the payment of duty, under circumstances of an exceptional nature, to be stated in such order, any goods on which Customs-duties are leviable.

24. The Customs-collector may, subject to any general rules relating to the landing and shipping of passengers' baggage and the passing of the same through the Custom-house, which may be made under section 75, pass free of duty any baggage in actual use, and for this purpose may determine, subject to any such rules, whether any goods shall be treated as baggage in actual use, or as goods subject to duty.

25. If goods produced or manufactured in British India be imported into any Customs-port from any Foreign port, such goods shall be liable to all the duties, conditions and restrictions (if any) to which goods of the like kind and value not so produced or manufactured are liable on the first importation thereof:

Provided that, if such importation takes place within three years after the exportation of such goods, and it is proved to the satisfaction of the Customs-collector that the property in such goods has continued in the person by whom, or on whose account, they were exported, the goods may be admitted without payment of duty.

26. Any goods produced or manufactured in British India which have been exported therefrom, and on the exportation of which any drawback of excise has been received shall, on being imported into any Customs-port, be subjected, unless the chief Customs-Authority in any particular case otherwise directs by special order, to payment of excise duty, at the rate to which goods of the like kind and quality are liable at such port.

27. All goods derelict, jetsam, flotsam and wreck, brought or coming into any place in British India shall be subject to the same duties, if any, to which goods of the like kind are for the time being subject on importation at any Customs-port, and shall in other respects be dealt with as if they were imported from a foreign port, unless it be shown to the satisfaction of the Customs-collector that such goods are the produce or manufacture of any place, from which they are entitled to be admitted duty-free.

28. Provisions and stores produced or manufactured in British India, required for use on board of any vessel proceeding to any Foreign Port, may be shipped free of duty, whether of customs or excise, in such quantities as the Customs-collector determines with reference to the tonnage of the vessel, the numbers of the crew and passengers, and the length of the voyage on which the vessel is about to depart:

Provided that no rum shall be so shipped on any vessel going on a voyage of less than thirty days' probable duration.

29. On the importation into, or exportation from, any Customs-post of any goods, whether liable to duty or not, the owner of such goods shall in his bill of entry or shipping-bill, as the case may be, state the real value, quantity, and description of such goods to the best of his knowledge and belief, and shall subscribe a declaration of the truth of such statement at the foot of such bill.

In case of doubt, the Customs-collector may require any such owner or any other person in possession of any invoice, broker's note, policy of insurance or other document, whereby the real value, quantity, or description of any such goods can be ascertained, to produce the same, and to furnish any information relating to such value, quantity, or description which it is in his power to furnish. And thereupon such person shall produce such document and furnish such information:

Provided that, if the owner makes and subscribes a declaration before the Customs-collector to the effect that he is unable, from want of full information, to state the real value or contents of any case, package or parcel of goods, then the Customs-collector shall permit him, previous to the entry thereof, (1) to open such case, package or parcel, and examine the contents in presence of an officer of customs, or (2) to deposit such case, package or parcel in a public warehouse appointed under section 15 without warehousing the same, pending the production of such information.

30. For the purposes of this Act the real value shall be deemed to be—

(a) the wholesale cash-price, less trade-discount, for which goods of the like kind and quality are sold, or are capable of being sold, at the time and place of importation or exportation as the case may be, without any abatement or deduction whatever, except (in the case of goods imported) of the amount of the duties payable on the importation thereof: or,

(b) where such price is not ascertainable, the cost at which goods of the like kind and quality could be delivered at such place without any abatement or deduction except as aforesaid.

31. Goods chargeable with duty upon the value thereof, but for which a specific value is not fixed by law for the purpose of levying duties thereon, shall, without unnecessary delay, be examined by an officer of Customs. If it appears that the real value of such goods is correctly stated in the bill-of-entry or shipping-bill, the goods shall be assessed in accordance therewith.

32. If it appears that such goods are properly chargeable with a higher rate or amount of duty than that to which they would be subject according to the value thereof as stated in the bill-of entry or shipping-bill, such officer may detail such goods.

In every such case the detaining officer shall forthwith give notice in writing to the owner of the goods of their detention, and of the value thereof, as estimated by him; and the Customs-collector shall, within two clear working days after such detention, or within such reasonable period as may with the consent of the parties be arranged, determine either to deliver such goods on payment of duty charged according to the entry of such owner, or to retain the same for the use of Government.

If the goods be retained for the use of Government, the Customs-collector shall cause the full amount stated in the bill as their real value to be paid to the owner in full satisfaction for such goods, in the same manner as if they had been transferred by ordinary sale, and shall, after due notice in the local official Gazette, or some local newspaper and without unnecessary delay, cause them to be put up to public auction in wholesale lots for cash on delivery.

If the Customs-collector deems the highest offer made at such sale to be inadequate, he may either adjourn the sale to some other day, to be notified as aforesaid, or buy in the goods, and without unnecessary delay dispose of them for the benefit of Government.

If the proceeds arising from such sale exceed the sum paid to the owner, together with (in the case of goods imported) the duty to which the goods are liable and all charges incurred by Government in connection with them, a portion not exceeding one-half of the overplus shall, at the discretion of the chief Officer of Customs, be payable to the officer who detected the under-valuation of the goods.

Nothing in this section shall prevent the chief Officer of Customs, when he has reason to believe that any such under-valuation was solely the result of accident or error, from permitting the owner of the goods, on his application for that purpose, to amend such entry, on payment of such increased rate of duties on the excess of the amended over the original valuation, or on such other terms as the Chief Officer of Customs may determine.

33. If, on the first examination of any such goods under section 31, the owner thereof states in writing that such goods are, in consequence of damage sustained before delivery of the bill of entry, of value less than that stated in such bill, the Customs-collector, on being satisfied of the fact, may allow abatement of duty accordingly.

The reduced duty to be levied on such goods may be ascertained by either of the following methods, at the option of the owner—

(a) the real value of such goods may be fixed on appraisement by an officer of Customs and the duty may be assessed on the value so fixed; or

(b) the goods may, after due notice in the local official Gazette or some local newspaper, be sold by public auction at such time (within thirty days from the date of delivery of the bill of entry), and at such place, as the Customs-collector appoints; and the duty may be assessed on the gross amount realized by such sale, without any abatement or deduction, except (in the case of goods imported) of so much as represents the duties payable on the importation thereof.

34. When any goods, the value of which has been fixed by law for the purpose of levying duties thereon, have before delivery of the bill-of-entry, deteriorated to the extent of more than one-tenth of their value, the duty on such goods shall if the owner thereof so desires be assessed *ad valorem*.

The real value of such goods shall be ascertained as provided in section 33, and the duty shall be assessed thereon.

35. No abatement of duty on account of damage shall be allowed on wines, spirit or beer, or on any other articles on which duties are levied on quantity and not on value.

36. Except as provided in section 94, no amendment of a bill of entry or shipping-bill relating to goods assessed for duty on the declared value, quantity, or description thereof shall be allowed after such goods have been removed from the Custom-house.

37. The rate of duty and the tariff valuation (if any) applicable to any goods imported shall be the rate and valuation in force on the date on which the bill of entry thereof is delivered to the Customs-collector under section 86 :

Provided that when such rate or valuation has been raised after the grant of port-clearance at the port of shipment, the rate and valuation applicable to such goods shall be the rate and valuation in force on the date of such grant.

Provided also that if such goods are warehoused and re-assessed under Section 115 of this Act, the rate and valuation applicable thereto shall be the rate and valuation in force at the time when application is made to clear such goods for home consumption.

Explanation.—A bill of entry shall for the purposes of this section be deemed to be delivered when it is first presented to the proper officer of Customs.

38. The rate of duty and tariff valuation (if any) applicable to any goods exported shall be the rate and valuation in force when a shipping-bill of such goods is delivered under section 137.

39. When Customs-duties or charges have been short-levied through inadvertence, error, collusion or misconstruction on the part of the officers of Customs, or through mis-statement as to real value, quantity, or description on the part of the owner, or when any such duty, or charge after having been levied, has been owing to any such cause erroneously refunded,

the person chargeable with the duty or charge so short-levied, or to whom such refund has erroneously been made, shall pay the deficiency or repay the amount paid to him in excess, on demand being made within three months from the date of the first assessment or making of the refund ;

and the Customs-collector may refuse to pass any goods belonging to such person until the said deficiency or excess be paid or repaid.

40. No Customs-duties or charges which have been paid, and of which repayment, wholly or in part, is claimed in consequence of the same having been paid through inadvertence, error or misconstruction, shall be returned, unless such claim is made within three months from the date of such payment.

41. The Customs-collector may, if he thinks fit, instead of requiring payment of Customs-duties and charges due from any mercantile firm or public body, at the time such duties and charges are payable under this Act, keep with such firm or body an account current of such duties and charges. Such account shall be settled at intervals not exceeding one month, and such firm or body shall make a deposit or furnish security sufficient in the opinion of the Customs-collector to cover the amount which may at any time be due from them in respect of such duties and charges.

CHAPTER VI.—DRAWBACK.

42. When any goods, capable of being easily identified, which have been imported by sea into any Customs-port from any Foreign port, and upon which duties of Customs have been paid on importation, are re-exported by sea from such Customs-port to any Foreign port, or as provisions or stores for use on board a ship proceeding to a Foreign port, seven-eighths of such duties shall, except as otherwise hereinafter provided, be repaid as drawback :

Provided that, in every such case, the goods be identified to the satisfaction of the Customs-collector at such Customs-port, and that the re-export be made within two years from the date of importation, as shown by the records of the Custom-house, or within such extended term as the chief Customs-Authority, on sufficient cause being shown, in any case determines.

43. When any goods having been charged with import-duty at one Customs-port and thence exported to another, are re-exported by sea as aforesaid, drawback shall be allowed on such goods as if they had been so re-exported from the former port.

Provided that, in every such case, the goods be identified to the satisfaction of the officer in charge of the Custom-house at the port of final exportation, and that such final exportation be made within three years from the date on which they were first imported into British India.

44. A drawback of the whole of the Customs-duties shall be allowed on wine and spirit intended for the consumption of any officer of Her Majesty's Navy, on board of any of Her Majesty's ships in actual service, unless such wine and spirit have been warehoused without payment of duty on the first entry thereof.

The quantity of wine and spirit on which drawback may be so allowed in any one year for the use of such officers shall not exceed the quantities hereinafter allowed for each such officer respectively: that is to say—

For every Admiral	...	...	...	Gals.	1,260
Vice-Admiral	...	...	...	"	1,050
Rear-Admiral	...	...	...	"	840
Captain of 1st and 2nd rate	...	...	...	"	630
Captain of 3rd, 4th and 5th rate...	...	...	...	"	420
Captain of an inferior rate	...	...	...	"	210
Lieutenant or other Commanding Officer, Marine-officer, Master, Purser or Surgeon					105

45. Every person clearing and claiming drawback for wine or spirit, as provided in section 44, shall state in the shipping bill the name of the officer for whose use such wine or spirit is intended, and of the ship in which he serves, as well as the place and date of the last supply for which drawback was allowed.

All such wine and spirit shall be delivered into the charge of the proper officers of Customs at the port of shipment, to be shipped under their care; and when the officer commanding the ship has certified the receipt of such wine and spirit into his charge, and any such officer of Customs has certified the shipment, the drawback shall be paid to the person entitled to receive the same.

46. The Customs-collector may permit the transfer of any such wine or spirit from one Naval officer to another Naval officer on board of the same, or of any other such vessel, as part of his authorized quantity; or may permit the transshipment of any such wine or spirit from one vessel to another for the use of the same Naval officer; or the re-landing and warehousing of any such wine or spirit for future reshipment.

The Customs-collector may also receive back the duties for any such wine or spirit, and allow the same to be cleared for home-consumption.

47. Provisions and stores for the use of Her Majesty's Navy or of any officer thereof which are subject to duty may, in like manner, be transferred, transhipped, relanded and warehoused, free of duty; and where duties have been paid on any such provisions or stores required for shipment, drawback of such duties, whether of customs or excise, shall be allowed on receipt of an application in writing from the officer commanding the ship for which they are intended, or from some other officer duly authorized to make such application.

The provisions of sections 44, 45, 46 and 47 as to officers of Her Majesty's Navy apply also to officers of Her Majesty's Indian Marine and Marine-Survey on board of any of the ships of such Marine or Survey proceeding to any port out of India, and the rules prescribed by section 47 as to provisions and stores for the use of Her Majesty's Navy apply also to provisions and stores for the use of such Marine or Survey.

49. The Governor-General in Council may from time to time, by notification in the *Gazette of India*,

(a) declare what goods shall, for the purpose of this chapter, be deemed to be capable of being easily identified; and

(b) prohibit the payment of drawback upon the re-exportation of goods to any specified Foreign Port in India.

50. Notwithstanding anything hereinbefore contained, no drawback shall be allowed—

(a) upon goods not included in the export-manifest, or

(b) where the goods to be exported are of less value than the amount of drawback claimed, or

(c) where the claim is for drawback amounting, in respect of any single shipment, to less than five rupees, and the Customs-collector thinks fit to reject it, or

(d) on salt, salted fish, or opium.

51. No drawback shall be allowed unless the claim to receive such drawback be made and established at the time of re-export.

No such payment of drawback shall be made until the vessel carrying the goods has put out to sea, or unless payment be demanded within six months from the date of entry for shipment.

52. Every person, or his duly authorized agent, claiming drawback on any goods duly exported, shall make and subscribe a declaration that such goods have been actually exported, and have not been re-landed and are not intended to be re-landed at any Customs-port; and that such person was at the time of entry outwards and shipment, and continues to be, entitled to drawback thereon.

CHAPTER VII.—ARRIVAL AND DEPARTURE OF VESSELS.

Arrival and entry of vessels inwards.

53. The Local Government may, by notification in the local official Gazette, fix a place in any river or port, beyond which no vessel arriving shall pass until a manifest has been delivered to the Pilot, officer of Customs or other person duly authorized to receive the same.

If, in any river or port wherein a place has been fixed by the Local Government under this section, the Master of any vessel arriving remains outside or below the place so fixed, such Master shall, nevertheless, within twenty-four hours after the vessel anchors, deliver a manifest to the Pilot, officer of Customs or other person authorized to receive the same.

54. If any vessel arrives at any Customs-port in which a place has not been so fixed, the Master of such vessel shall, within twenty-four hours after such vessel has anchored within the limits of the port, deliver a manifest to the Pilot, officer of Customs or other person authorized to receive the same.

55. Every manifest shall be signed by the Master, shall specify all goods imported in such vessel, showing separately all goods (if any) intended to be landed, transhipped or taken on to another port, and all ships' stores intended for consump-

tion in port or on the homeward voyage, and shall contain such further particulars, and be made out in such form, as the chief Customs-Authority may from time to time direct.

The Customs-collector shall permit the Master to amend any obvious error in the manifest, or to supply any omission which in the opinion of such Collector results from accident or inadvertence, by furnishing an amended or supplementary manifest, and may, if he thinks fit, levy thereon such fee as the chief Customs-Authority from time to time directs. Except as herein provided no import manifest shall be amended.

56. The person receiving a manifest under section 53 or 54 shall countersign the same and enter thereon such particulars as the chief Customs-Authority from time to time directs in this behalf.

57. No vessel arriving in any Customs-port shall be allowed to break bulk until a manifest has been delivered as hereinbefore provided; nor until a copy of such manifest, together with an application for entry of such vessel inwards, has been presented by the Master to the Customs-collector, and an order has been given thereon for such entry.

58. The Master shall, if required so to do by the Customs-collector at the time of presenting such application, deliver to the Customs-collector the bill of lading or a copy thereof for every part of the cargo laden on board, and any port-clearance, cockett or other paper granted in respect of such vessel at the place from which she is stated to have come, and shall answer all such questions relating to the vessel, cargo, crew and voyage as are put to him by such officer.

The Customs-collector may, if any requisition or question made or put by him under this section is not complied with or answered, refuse to grant such application.

59. Notwithstanding anything contained in section 57, the Customs-collector may grant, prior to receipt of the manifest, and to the entry inwards of the vessel, a special pass permitting bulk to be broken.

The granting of such pass shall be subject to such rules as may from time to time be made by the chief Customs-Authority.

60. Notwithstanding anything contained in section 53, 54, 57 or 58, the Customs-collector may accept from the ship's agent in lieu of the Master delivery of the manifest or of any other document required by those sections to be delivered by the Master.

Entry outwards, port-clearance and departure of vessels.

61. No vessel shall take on board any part of her export-cargo, until a written application for entry of such vessel outwards subscribed by the Master of such vessel, has been made to the Customs-collector or before an order has been given thereon by such officer for such entry. Every application made under this section shall specify the name, tonnage, and national character of the vessel, the name of the Master, and the name of every place for which cargo is to be shipped.

62. No vessel, whether laden or in ballast, shall depart from any Customs-port until a port-clearance has been granted by the Customs-collector or other officer duly authorized to grant the same. And no Pilot shall take charge of any vessel proceeding to sea, unless the Master of such vessel produces a port-clearance.

63. Every application for port-clearance shall be made by the Master at least twenty-four hours before the intended departure of the vessel.

The Master shall, at the time of applying for port-clearance—

(a) deliver to the Customs-collector a manifest in duplicate in such form as may from time to time be prescribed by the chief Customs-Authority, signed by such

Master, specifying all goods to be exported in the vessel, and showing separately all goods and stores entered in the import-manifest, and not landed or consumed on board or transhipped :

(b) deliver to the Customs-collector such shipping bills or other documents as such Customs-collector acting under the general instructions of such chief Customs-Authority, requires; and

(c) answer to the proper officer of Customs such questions touching the departure and destination of the vessel as are demanded of him.

The provisions of section 55 relating to the amendment of import-manifests shall *mutatis mutandis* apply also to export manifests delivered under this section.

64. The Customs-collector may refuse port-clearance to any vessel until

(a) the provisions of section 63 are complied with;

(b) all Port-dues and other charges and penalties due by such vessel, or by the owner or Master thereof, and all duties payable in respect of any goods shipped therein have been duly paid, or their payment secured by such guarantee, or by a deposit at such rate as such Customs-collector directs;

(c) the ship's agent (if any) delivers to the Customs-collector a declaration in writing to the effect that he will be liable for any penalty imposed under section 167, No. 17, and furnishes security for the discharge of the same;

(d) the ship's agent (if any) delivers to the Customs-collector a declaration in writing to the effect that such agent is answerable for the discharge of all claims for damage or short delivery which may be established by the owner of any goods comprised in the import-cargo in respect of such goods.

A ship's agent delivering a declaration under clause (c) of this section shall be liable to all penalties which might be imposed on the Master under section 167, No. 17, and a ship's agent delivering a declaration under clause (d) of this section shall be bound to discharge all claims referred to in such declaration.

65. When the Customs-collector is satisfied that the provisions of section 63 and if necessary of clauses (b) and (c) and (d) of section 64 have been complied with, he shall grant a port-clearance to the Master, and shall return at the same time to such Master one copy of the manifest duly countersigned by the proper officer of Customs.

66. Notwithstanding anything contained in sections 64 and 65, the Customs-collector may (subject to such rules as the chief Customs-Authority may from time to time prescribe) grant a port-clearance to the Master when the ship's agent furnishes such security as the Customs-collector deems sufficient for duly delivering, within five days from the date of such grant, the manifest and other documents specified in section 63.

CHAPTER VIII.—GENERAL PROVISIONS AFFECTING VESSELS IN PORT.

67. The Customs-collector at any Customs-port may at any time depute at his discretion one or more officers of Customs to board any vessel in or arriving at such Port. Every officer of Customs so sent shall remain on board of such vessel by day and by night unless or until the Customs-collector otherwise orders.

68. Whenever an officer of Customs is so deputed on board of any vessel, the Master of such vessel shall be bound to receive on board such officer, and one servant of such officer, and to provide such officer and servant with suitable shelter and accommodation, and likewise with a due allowance of fresh water, and with the means of cooking on board.

69. Every officer of Customs so deputed shall have free access to every part of the vessel, and may fasten down any hatchway or entrance to the hold, and

mark any goods before landing, and lock up, seal, mark, or otherwise secure any goods on board of such vessel.

If any box, place or closed receptacle in any such vessel be locked, and the key be withheld, such officer shall report the same to the Customs-collector, who may thereupon issue to the officer on board, or to any other officer under his authority, a written order to search.

On production of such order, the officer bearing the same may require that any such box, place or closed receptacle be opened in his presence; and, if it be not opened upon his requisition, he may break open the same.

70. Unless with the written permission of the Customs-collector or in accordance with a general permission granted under section 74, no goods, other than passengers' baggage, or ballast urgently required to be shipped for the vessel's safety, shall be shipped or waterborne to be shipped or discharged from any vessel in any Customs-port, except in the presence of an officer of Customs.

71. When an officer of Customs is deputed under section 67 to remain on board a vessel, the tonnage of which does not exceed six hundred tons, a period of thirty working days, reckoned from the date on which he boards such vessel, or such additional period as the Customs-collector directs, shall be allowed for the discharge of import-cargo and the shipment of export-cargo on board of such vessel.

One additional day shall, in like manner, be allowed for every fifty tons in excess of six hundred. No charge shall be made for the services of a single officer of Customs for such allowed number of working days, or for the services of several such officers (if available) for respective periods not exceeding in the aggregate such allowed number of working days.

If the period occupied in the discharge and shipment of cargo be in excess of thirty working days, together with the additional period (if any) allowed under this section, the vessel shall be charged with the expense of the officer of Customs at a rate not exceeding five rupees per diem (Sundays and holidays excepted) for such excess period. In calculating any period allowed, or any charge made, under this section, the period (if any) during which a vessel after the completion of the discharge of import-cargo, and before commencing the shipment of export-cargo, is laid up by the withdrawal of the officer of Customs upon application from the Master, shall be deducted.

72. Except with the written permission of the Customs-collector, no goods, other than passengers' baggage, shall in any Customs-port be discharged from any vessel, or be shipped or water-borne to be shipped—(a) on any Sunday or on any holiday or day in which the discharge of shipping or cargo, as the case may be, is prohibited by the chief Customs-Authority; (b) on any day, except between such hours as such authority from time to time appoints by notification in the official Gazette.

73. No goods shall in any Customs-port be landed at any place other than a wharf or other place duly appointed for that purpose, and unless with the written permission of the Customs-collector or when a general permission has been granted under section 74, no goods shall in any Customs-port be shipped or water-borne to be shipped from any place other than a wharf or other place duly appointed for that purpose.

74. Notwithstanding anything contained in section 70 or 73, the chief Customs-Authority may, by notification in the local official Gazette, give general permission for goods to be shipped or water-borne to be shipped in any Customs-port from all or any places not duly appointed as wharves, and without the presence or authority of an officer of Customs.

75. The chief Customs-Authority may from time to time make rules for the landing and shipping of passengers' baggage and the passing of the same through the Customs-house; and for the landing, shipping and clearing of parcels forwarded by Her Majesty's or other mails, or by other regular packets and passenger vessels.

When any baggage or parcels is or are made over to an officer of customs for the purpose of being landed a fee of such amount as the Local Government from time to time directs shall be chargeable thereon, as compensation for the expense and trouble incurred in landing and depositing the same in the Custom-house.

76. When any goods are water-borne for the purpose of being landed from any vessel and warehoused or cleared for home-consumption, or of being shipped for exportation on board of any vessel, there shall be sent, with each boat-load or other separate despatch, a boat-note specifying the number of packages so sent and the marks and numbers or other description thereof. Each boat-note for goods to be landed shall be signed by an officer of the vessel, and likewise by the officer of Customs on board, if any such officer be on board, and shall be delivered on arrival to any officer of Customs authorized to receive the same.

Each boat-note for goods to be shipped shall be signed by the proper officer of Customs, and, if an officer of Customs is on board of the vessel on which such goods are to be shipped, shall be delivered to such officer. If no such officer be on board, every such boat-note shall be delivered to the Master of the vessel, or to an officer of the vessel appointed by him to receive it.

The officer of Customs who receives any boat-note of goods landed, and the officer of Customs, Master, or other officer, as the case may be, who receives any boat-note of goods shipped, shall sign the same and note thereon such particulars as the chief Customs-Authority may from time to time, direct. The Local Government may from time to time by notification in the local official Gazette, suspend the operation of this section in any Customs-port or part thereof.

77. All goods water-borne for the purpose of being landed or shipped shall be landed or shipped without any unnecessary delay.

78. Except in cases of imminent danger no goods discharged into or loaded in any boat for the purpose of being landed or shipped shall be transhipped into any other boat without the permission of an officer of Customs.

79. The Local Government may declare with regard to any Customs-port, by notification in the local official Gazette, that after a date therein specified, no boat not duly licensed and registered shall be allowed to ply as a cargo-boat for the landing and shipping of merchandize within the limits of such Port.

In any port with regard to which such notification has been issued, the chief Officer of Customs or other officer whom the Local Government appoints in this behalf, may, subject to such rules and on payment of such fees as the Local Government from time to time prescribes by notification in the local official Gazette, issue licenses for, and register, cargo-boats. Such officer may also, subject to rules so prescribed, cancel any license so issued.

80. The Customs-collector may, whenever he thinks fit, require that goods stowed in bulk, and brought by sea or intended for exportation, shall be weighed or measured on board-ship before landing or after shipment, and may levy duty according to the result of such weighing or measurement.

CHAPTER IX.—OF DISCHARGE OF CARGO AND ENTRY INWARDS OF GOODS.

81. When an order for entry inwards of any vessel which has arrived in any Customs-port, or a special pass permitting such vessel to break bulk, has been given, the discharge of the cargo of such vessel may be proceeded with.

82. Except as otherwise provided in this Act, no goods shall be allowed to leave any such vessel, unless they are entered in the original manifest of such vessel, or in an amended or supplementary manifest received under section 55.

83. If the owner of any goods (except such as have been shown in the import-manifest as not to be landed) does not land such goods within such period as is specified in the bill of lading of such goods, or if no period is so specified within such number of working days, not exceeding fifteen, after the entry of the vessel importing the same, as the Local Government from time to time appoints by notification in the official Gazette, or if the cargo of any vessel, with the exception of only a small quantity of goods, has been discharged previously to the expiration of the period so specified or appointed, as the case may be,—the Master of such vessel or, on his application, the proper officer of Customs, may then carry such goods to the Custom-house, there to remain for entry. The Customs-collector shall thereupon take charge of and grant receipts for such goods; and if notice in writing has been given by the Master that the goods are to remain subject to a lien for freight, primage, general average, or other charges of a stated amount, the Customs-collector shall hold such goods until he receives notice in writing that the said charges are paid.

84. At any time after the arrival of any vessel, the Customs-collector may, with the consent of the Master of such vessel, cause any small package or parcel of goods to be carried to the Custom-house, there to remain for entry, in charge of the officers of Customs, during the remainder of the working days allowed under this Act for the landing of such package or parcel.

If any package or parcel so carried to the Custom-house remains unclaimed on the expiration of the number of working days so allowed for its landing, or at the time of the clearance outwards of the vessel from which it was landed, the Master may give such notice as is provided in section 83, and the officer in charge of the Custom-house shall thereupon hold such package or parcel as provided in that section.

85. Notwithstanding anything contained in sections 83 and 84 the Customs-collector in any Customs-port to which the Local Government, by notification in the local official Gazette, declares this section to be applicable, may permit the Master of any vessel immediately on receipt of an order under section 57 or special pass under section 59, to discharge the cargo of such vessel or any portion thereof into the custody of the ship's agents if willing to receive the same, for the purpose of landing the same, forthwith—(a) at the Custom-house or any specified landing-place or wharf; or (b) at any landing-place or wharf belonging to any Port Commissioners, Port Trust or other public body or company;

Any ship's agent so receiving such cargo or portion shall be bound to discharge all claims for damage of short delivery which may be established in respect of the same by the owner thereof, and shall be entitled to recover from such owner his charges for service rendered, but not for commission or the like, where any agent for the landing of such cargo or portion has been previously appointed by the owner and such appointment is unrevoked. The Customs-collector shall take charge of all goods discharged under clause (a) of this section, and otherwise proceed in relation thereto as provided in sections 83 and 88. A public body or company at whose landing place or wharf any goods are discharged under clause (b) of this section, shall not permit the same to be removed without an order in writing from the Customs-collector.

86. The owner of any goods imported shall on the landing thereof from the importing ship make entry of such goods for home consumption or warehousing by delivering to the Customs-collector a bill of entry thereof in duplicate, in such form and containing such particulars, in addition to the particulars specified in section 29, as may, from time to time, be prescribed by the chief Customs-Authority.

The particulars of such entry shall correspond with the particulars given of the same goods in the manifest of the ship.

87. On the delivery of such bill the duty (if any) leviable on such goods shall be assessed, and the owner of such goods may then proceed to clear the same for home-consumption, or warehouse them, subject to the provisions hereinafter contained.

88. If any goods are not entered and cleared for home-consumption, or warehoused, within four months from the date of entry of the vessel, such goods may, after due notice to the owner, if his address can be ascertained, and in the Local official Gazette, be sold by public auction, and the proceeds thereof shall be applied first, to the payment of freight, primage and general average, if the goods are held by the Customs-collector subject to such charges under notice given under section 83, 84 or 85; next, to the payment of the duties which would be leviable on such goods if they were then cleared for home-consumption, and next to the payment of the other charges (if any) payable to the Customs-collector in respect of the same.

The surplus, if any, shall be paid to the owner of the goods, on his application for the same; provided that such application be made within one year from the sale of the goods, or that sufficient cause be shown for not making it within such period.

If any goods of which the Customs-collector has taken charge under section 83, 84 or 85 be of a perishable nature, the Customs-collector may at any time direct the sale thereof, and shall apply the proceeds in like manner:

Provided that, where any goods liable to be sold under this section are arms, ammunition or military stores, they may be sold or otherwise disposed of at such place (whether within or without British India), and in such manner, as the Local Government may from time to time direct:

Provided also, that nothing in this section shall authorize the removal for home-consumption of any dutiable goods without payment of duties of customs thereon.

CHAPTER X.—OF CLEARANCE OF GOODS FOR HOME-CONSUMPTION.

89. When the owner of any goods entered for home-consumption, and (if such goods be liable to duty) assessed under section 87, has paid the import-duty (if any) assessed on such goods and any charges payable under this Act in respect of the same, the Customs-officer may make an order clearing the same; and such order shall be sufficient authority for the removal of such goods by the owner.

CHAPTER XI.—WAREHOUSING.

Of the admission of goods into a warehouse.

90. When any dutiable goods have been entered for warehousing and assessed under section 87, the owner of such goods may apply for leave to deposit the same in any warehouse appointed or licensed under this Act.

91. Every such application shall be in writing signed by the applicant, and shall be in such form as is from time to time prescribed by the chief Customs-Authority.

92. When any such application has been made in respect of any goods, the owner of the goods to which it relates shall execute a bond, binding himself, in a penalty of twice the amount of duty assessed under section 87 on such goods, (a) to observe all rules prescribed by this Act in respect of such goods; (b) to pay on demand, all duties, rent and charges claimable on account of such goods under this Act, together with interest on the same from the date of demand, at such rate not exceeding six per cent. per annum as is for the time being fixed by the chief Customs-Authority; and (c) to discharge all penalties incurred for violation of the provisions of this Act in respect of such goods.

Every such bond shall be in the form marked A hereto annexed, or, when such form is inapplicable or insufficient in such other form as is from time to time prescribed by the chief Customs-Authority,

and shall relate to the cargo or portion of the cargo of one vessel only.

93. When the provisions of sections 91 and 92 have been complied with in respect of any goods, such goods shall be forwarded in charge of an officer of customs to the warehouse in which they are to be deposited.

A pass shall be sent with the goods specifying the name of the importing vessel and of the boulder, the marks, numbers and contents of each package, and the warehouse or place in the warehouse wherein they are to be deposited.

94. On receipt of the goods, the pass shall be examined by the warehouse-keeper, and shall be returned to the Customs-collector. No package, butt, cask or hogshead shall be admitted into any warehouse unless it bear the marks and numbers specified in, and otherwise correspond with, the pass for its admission. If the goods be found to correspond with the pass, the warehouse-keeper shall certify to that effect on the pass, and the warehousing of such goods shall be deemed to have been completed. If the goods do not so correspond, the fact shall be reported by the warehouse-keeper for the orders of the Customs-collector, and the goods shall either be returned to the Custom-house in charge of an officer of Customs or kept in deposit pending such orders, as the warehouse-keeper deems most convenient. If the quantity or value of any goods has been erroneously stated in the bill of entry, the error may be rectified at any time before the warehousing of the goods is completed, and not subsequently.

95. Except as provided in section 100, all goods shall be warehoused in the packages, butts, casks or hogsheads in which they have been imported.

96. Whenever any goods are lodged in a public warehouse or a licensed private warehouse, the warehouse-keeper, or, in the case of the Bengal Bonded Warehouse Association, the Secretary of the said Association, shall deliver a warrant signed by him as such to the person lodging the goods. Such warrant shall be in the form B hereto annexed, and shall be transferable by endorsement; and the endorsee shall be entitled to receive the goods specified in such warrant on the same terms as those on which the person who originally lodged the goods would have been entitled to receive the same. The Local Government may by notification in the local official Gazette exempt salt and salted fish from the operation of this section, and may in like manner cancel such exemption.

Rules relating to goods in a warehouse.

97. The Customs-collector or any officer deputed by him for the purpose, shall have access to any private warehouse licensed under this Act.

98. The Customs-collector may at any time by order in writing direct that any goods or packages lodged in any warehouse shall be opened, weighed or otherwise examined; and after any goods have been so opened or examined, may cause the same to be sealed or marked in such manner as he thinks fit.

When any goods have been so sealed and marked after examination, they shall not be again opened without the permission of the Customs-collector; and when any such goods have been opened with such permission, the packages shall, if he thinks fit, be again sealed or marked as before.

99. Any owner of goods lodged in a warehouse shall, at any time within the hours of business, have access to his goods in presence of an officer of Customs, and an officer of Customs shall, upon application for the purpose being made in writing to the Customs-collector, be deputed to accompany such owner.

When an officer of Customs is specially employed to accompany such owner, a sum sufficient to meet the expense thereby incurred shall, if the Customs-collector so require, be paid by such owner to the Customs-collector, and such sum shall, if the Customs-collector so direct, be paid in advance.

100. With the sanction of the Customs-collector, and after such notice given, and under such rules and conditions as the chief Customs-Authority from time to time prescribes, any owner of goods may, either before or after warehousing the same,—

(a) sort, separate, pack and repack the goods and make such alterations therein as may be necessary for the preservation, sale, shipment or disposal thereof (such goods to be repacked in the packages in which they were imported, or in such other packages as the Customs-collector permits);

(b) fill up any casks of wine, spirit or beer from any casks of the same secured in the same warehouse;

(c) mix any wines or spirit of the same sort secured in the same warehouse, erasing from the cask all import-brands, unless the whole of the wine or spirit so mixed be of the same brand;

(d) bottle off wine or spirit from any casks;

(e) take such samples of goods as may be allowed by the Customs-collector with or without entry for home consumption, and with or without payment of duty, except such as may eventually become payable on a deficiency of the original quantity.

After any such goods have been so separated and repacked in proper or approved packages, the Customs-collector may, at the request of the owner of such goods, cause or permit any refuse, damaged, or surplus goods remaining after such separation or repacking (or, at the like request, any goods which may not be worth the duty) to be destroyed, and may remit the duty payable thereon.

101. If goods be lodged in a public warehouse, the owner shall pay monthly, on receiving a bill or written demand for the same from the Customs-collector or other officer deputed by him in that behalf, rent and warehouse-dues at such rates as the chief Customs-Authority or such officer of customs as such Authority from time to time appoints in this behalf may fix. A table of the rates of rent and warehouse dues so fixed shall be placed in a conspicuous part of such warehouse.

If any bill for rent or warehouse-dues presented under this section is not discharged within ten days from the date of presentation, the Customs-collector may, in the discharge of such demand (any transfer or assignment of the goods notwithstanding) cause to be sold by public auction, after due notice in the local official Gazette, such sufficient portion of the goods as he may select.

Out of the proceeds of such sale the Customs-collector shall first satisfy the demand for the discharge of which the sale was ordered, and shall then pay over the surplus (if any) to the owner of the goods: Provided that the application for such surplus be made within one year from the date of the sale of the goods, or that sufficient cause be shown for not making it within such period.

102. No warehoused goods shall be taken out of any warehouse, except on clearance for home-consumption or shipment, or for removal to another warehouse or as otherwise provided by this Act.

103. Any goods warehoused may be left in the warehouse in which they are deposited or in any warehouse to which they may in manner hereinafter provided be removed till the expiry of three years after the date of the bond executed in relation to such goods under section 92. The owner of any goods remaining in a warehouse on the expiry of such period shall clear the same for home-consumption or shipment in manner hereinafter provided :

Provided that when the license for any private warehouse is cancelled, and the Customs-collector gives notice of such cancelment to the owner of any goods deposited in such warehouse, such owner shall in manner hereafter provided, and within seven days from the date on which such notice is given, remove such goods to another warehouse or clear them for home-consumption or shipment.

Of the removal of goods from one warehouse to another.

104. Any owner of goods warehoused under this Act may, at any time within three years from the date of the bond executed in respect of such goods under section 92, and with the permission of the chief Customs-Officer, and on such conditions and after giving such security (if any) as such officer directs, remove goods from one warehouse to another warehouse in the same port.

When any owner desires so to remove any goods, he shall apply for permission to do so in such form as the chief Customs-Authority from time to time prescribes.

105. Any owner of goods warehoused at any warehousing port may, from time to time, within the said period of three years remove the same by sea or by inland carriage, in order to be re-warehoused at any other warehousing port.

When any owner desires so to remove any goods for such purpose, he shall apply to the chief Customs-Officer, stating the particulars of the goods to be removed, and the name of the port to which it is intended that they shall be removed, together with such other particulars, and in such manner and form, as the chief Customs-Authority from time to time prescribes.

106. When permission is granted for the removal of any goods from one warehousing port to another under section 105, an account containing the particulars thereof shall be transmitted by the proper officer of the port of removal to the proper officer of the port of destination ;

and the person requiring the removal shall before such removal enter into a bond, with one sufficient surety, in a sum equal at least to the duty chargeable on such goods, for the due arrival and re-warehousing thereof at the port of destination within such time as the chief Customs-Authority directs.

Such bond may be taken by the proper officer, either at the port of removal or at the port of destination, as best suits the convenience of the owner.

If such bond is taken at the port of destination, a certificate thereof, signed by the proper officer of such port, shall, at the time of the removal of such goods, be produced to the proper officer at the port of removal ; and such bond shall not be discharged unless such goods are produced to the proper officer, and duly re-warehoused at the port of destination within the time allowed for such removal or are otherwise accounted for to the satisfaction of such officer ; nor until the full duty due upon any deficiency of such goods, not so accounted for, has been paid.

107. The chief Customs-Authority may permit any person desirous of removing warehoused goods to enter into a general bond, with such sureties, in such amount, and under such conditions as the chief Customs-Authority approves, for the removal, from time to time, of any goods from one warehouse to another, either in the same or in a different port, and for the due arrival and re-warehousing of such goods at the port of destination within such time as such Authority directs.

108. Upon the arrival of warehoused goods at the port of destination, they shall be entered and warehoused in like manner as goods are entered and warehoused on the first importation thereof, and under the laws and rules, in so far as such laws and rules are applicable, which regulate the entry and warehousing of such last mentioned goods.

109. Every bond executed under section 92 in respect of any goods shall, unless the chief Officer of Customs in any case deems a fresh bond to be necessary, continue in force, notwithstanding the consequent removal of such goods to another warehouse or warehousing port.

Clearance for home-consumption or shipment.

110. Any owner of goods warehoused may, at any time within three years from the date of the bond executed under section 92 in respect of such goods, clear such goods for home-consumption by paying (a) the duty assessed on such goods under section 87, or where the duty on such goods is altered under the provisions hereinafter contained, such altered duty; and (b) all rent, penalties, interest and other charges payable to the Customs-collector in respect of such goods.

111. Any owner of goods warehoused may, at any time within three years from the date of the bond executed under section 92, in respect of such goods clear such goods for shipment to a Foreign port on payment of all rent, penalties, interest and other charges payable as aforesaid and without payment of import duty on the same:

Provided that the Governor-General in Council may prohibit the shipment for exportation to any specified foreign port of warehoused goods in respect of which payment of drawback or transshipment has been prohibited under section 49 or 134 respectively.

112. Provisions and stores warehoused at the time of importation may within the said period of three years be shipped without payment of duty for use on board of any vessel proceeding to a Foreign port.

113. Application to clear goods from any warehouse for home-consumption or for shipment shall be made in such form as the chief Customs-Authority from time to time prescribes. Such application shall ordinarily be made to the Customs-collector at least twenty-four hours before it is intended so to clear such goods.

114. If any goods upon which duties are leviable *ad valorem* or on a tariff valuation receive damage through unavoidable accident after they have been entered for warehousing and assessed under section 87, and before they are cleared for home-consumption, they shall, if the owner so desires, be re-assessed for duty according to their actual value, and a new bond for the same may, at the option of the owner, be executed for the unexpired term of warehousing.

115. If after any goods entered for warehousing have been assessed under section 87, any alteration is made in the duty leviable upon such goods or in the tariff valuation (if any) applicable thereto, such goods shall be re-assessed in accordance with the second proviso to section 37.

116. If it appear at the time of clearing any wine, spirit, beer or salt from any warehouse for home consumption that there exists a deficiency not otherwise accounted for to the satisfaction of the Customs-collector, an allowance on account of ullage and wastage shall be made in adjusting the duties thereon, as follows (namely),

(a) upon wine, spirit and beer in cask to an extent not exceeding the rates specified below, or such other rates as may from time to time be prescribed in this behalf by the Local Government and notified in the official Gazette:

For any time not exceeding	6 months	... 2½ per cent.
Exceeding 6 months and not exceeding	12 "	... 5 "
Exceeding 12 months and not exceeding	18 "	... 7½ "
Exceeding 18 months and not exceeding	2 years	... 10 "
Exceeding 2 years and not exceeding	3 "	... 12 "

(b) in the case of salt warehoused in a public warehouse, only the amount actually cleared shall be charged with Customs-duties;

(c) in the case of salt warehoused in a private warehouse, wastage shall be allowed at such rate as may be prescribed from time to time by the Local Government and notified in the local official Gazette.

117. When any wine, spirit, beer or salt lodged in a warehouse is found to be deficient at the time of the delivery therefrom, and such deficiency is proved to be due solely to ullage or wastage, the chief Customs-Authority may direct, in respect of any such article, that allowance be made in any special case for a rate of ullage or wastage exceeding that contemplated in section 116.

Of the forfeiture and discharge of the bond.

118. If any warehoused goods are removed from the warehouse in contravention of section 102; or if any such goods have not been removed from the warehouse at the expiration of the time during which such goods are permitted by section 103 to remain in such warehouse; or if any goods in respect of which a bond has been executed under section 92 and which have not been cleared for home-consumption, or shipment or removal under this Act, are lost or destroyed otherwise than as provided in section 100 or as mentioned in section 122, or are not accounted for to the satisfaction of the Customs-collector, or if any such goods have been taken under section 100 as samples without payment of duty, the Customs-collector may thereupon demand, and the owner of such goods shall forthwith pay, the full amount of duty chargeable on account of such goods, together with all rent, penalties, interest and other charges payable to the Customs-collector on account of the same.

119. If any owner fails to pay any sum so demanded, the Customs-collector may forthwith either proceed upon the bond executed under section 92, or cause such portion as he thinks fit of the goods (if any) in the warehouse on account of which the amount is due, to be detained with a view to the recovery of the demand; and if the demand be not discharged within ten days from the date of such detention (due notice thereof being given to the owner), the goods so detained may be sold by public auction duly advertised in the local official Gazette.

The net proceeds of any sale so made of goods so detained shall be written off upon the bond in discharge thereof to the amount received, and if any surplus be obtained from such sale, beyond the amount of the demand, such surplus shall be paid to the owner of the goods: Provided that application for the same be made within one year from the sale, or that sufficient cause be shown for not making the application within such period. No transfer or assignment of the goods shall prevent the Customs-collector from proceeding against such goods in the manner above provided, for any amount due thereon.

120. When any warehoused goods are taken out of any warehouse, the Customs-collector shall cause the fact to be noted on the back of the bond.

Every note so made shall specify the quantity and description of such goods, the purposes for which they have been removed, the date of removal, the name of the person removing them, the number and date of the shipping bill under which they have been taken away if removed for exportation by sea, or of the bill entry if removed for home-consumption, and the amount of duty paid (if any).

121. A register shall be kept of all bonds entered into for Customs-duties on warehoused goods, and entry shall be made in such register of all particulars required by section 120 to be specified.

When such register shows that the whole of the goods covered by any bond have been cleared for home-consumption or shipment, or otherwise duly accounted for, and when all amounts due on account of such goods have been paid, the Customs-collector shall cancel such bond as discharged in full, and shall on demand deliver it, so cancelled, to the person who has executed or who is entitled to receive it.

Miscellaneous.

122. If any goods in respect of which a bond has been executed under section 92 and which have not been cleared for home consumption are lost or destroyed by unvoidable accident or delay, the chief Customs-Authority may in its discretion remit the duties due thereon,

Provided that, if any such goods be so lost or destroyed in a private warehouse, notice thereof be given to the Customs-collector within forty-eight hours after the discovery of such loss or destruction.

123. The warehouse-keeper in respect of goods lodged in a public warehouse, and the licensee in respect of goods lodged in a private warehouse, shall be responsible for their due reception therein and delivery therefrom, and for their safe custody while deposited therein, according to the quantity, weight or gauge reported by the Custom-house officer who has assessed such goods, allowance being made, if necessary, for ullage and wastage as provided in sections 116 and 117. Provided that no owner of goods shall be entitled to claim from the Customs-collector, or from any keeper of a public warehouse, compensation for any loss or damage occurring to such goods while they are being passed into or out of such warehouse, or while they remain therein, unless it be proved that such loss or damage was occasioned by the wilful act or neglect of the warehouse-keeper or of an officer of Customs.

124. Every public warehouse shall be under the lock and key of a warehouse-keeper appointed by the chief Officer of Customs.

125. The chief Customs-Authority, or such officer of customs as such Authority from time to time appoints in this behalf, may from time to time determine in what division of any public warehouse, and in what manner, and on what terms, any goods may be deposited, and what sort of goods may be deposited in any such warehouse.

126. The expenses of carriage, packing and stowage of goods on their reception into or removal from a public warehouse shall, if paid by the Customs-collector or by the warehouse-keeper, be chargeable on the goods, and be defrayed by, and recoverable from, the owner, in the manner provided in section 119.

127. All the provisions of this Act, relating to private warehouses, shall be applicable to the warehouses wherein the Bengal Bonded Warehouse Association receives bonded goods.

CHAPTER XII.—TRANSHIPMENT.

128. In the Ports of Calcutta, Madras, Bombay, Karwar, Karachi, Aden, Rangoon, Maulmain, Akyab, Chittagong, and such other ports as the Governor-General in Council may from time to time, by notification in the *Gazette of India*, direct in this behalf, the Customs-collector may, on application by the owner of any goods imported into such port, and specially and distinctly manifested at the time of importation as for transhipment to some other Customs or Foreign port, grant leave to tranship the same without payment of the duty, (if any) leviable, at the port of transhipment, and without any security or bond for the due arrival and entry of the goods at the port of destination.

In any Customs-port other than a port in which the preceding clause may for the time being be in force, the Customs-collector may, on application by the owner of any goods so imported and manifested, grant leave for transhipment without payment of the duty (if any) leviable at such port; provided that, where the goods so transhipped are dutiable, and are to be removed to some other Customs-port, the applicant shall enter into a bond, with such security as may be required of him,

in a sum equal at least to the duty chargeable on such goods, for the due arrival and entry thereof at the port of destination within such time as such Customs-collector directs.

129. An officer of Customs shall, in every case, be deputed free of charge to superintend the removal of transhipped goods from vessel to vessel.

130. The powers conferred on the Customs-collector by section 128 shall be exercised, and the transhipment shall be performed, subject to such rules as may from time to time be made by the Local Government.

No rules made under this section shall come into force until after the expiry of such reasonable time from the date of the publication of the same as the Local Government may in each case appoint in this behalf.

131. All goods transhipped under the second clause of section 128 for removal to a Customs-port shall on their arrival at such port be entered in like manner as goods are entered on the first importation thereof, and under the laws and rules, in so far as such laws and rules can be made applicable, which regulate the entry of such last-mentioned goods.

132. If two or more vessels belonging wholly or in part to the same owner be at any Customs-port at the same time, any provisions and stores in use or ordinarily shipped for use on board may, at the discretion of the Customs-collector, be transhipped from one such vessel to any other such vessel without payment of import-duty.

133. A transhipment-fee on any goods or class of goods transhipped under this Act, may be levied at such rates, on each bale or package, or according to weight, measurement, quantity, or number, and under such rules as the Local Government, with the previous sanction of the Governor-General in Council, may from time to time by notification in the local official Gazette prescribe for each port.

134. The Governor-General in Council may from time to time, by notification in the *Gazette of India*, prohibit, at any specified port, or at all ports, the transhipment, of any specified class of goods, generally or when destined for any specified ports, or prescribe any special mode of transhipping any specified class of goods.

135. Except as provided in this Act, no goods shall be transhipped at any port or place in British India.

CHAPTER—XIII. EXPORTATION OR SHIPMENT, AND RE-LANDING.

136. Except with the written permission of the Customs-collector, no goods other than passengers' baggage, or ballast urgently required for a vessel's safety, shall be shipped or water-borne to be shipped in any vessel in a Customs-port until an order has been obtained under section 61 for entry outwards of such vessel.

When such order has been obtained, the export cargo of such vessel may be shipped, subject to the provisions next hereinafter contained.

137. Unless the chief Customs-Authority shall, in the case of any Customs-port or wharf, or of any class of goods, otherwise direct by notification in the local official Gazette, no goods, except passengers' baggage, shall be shipped or water-borne to be shipped for exportation, until—(a) the owner has delivered to the Customs-collector, or other proper officer, a shipping-bill of such goods in duplicate in such form and containing such particulars in addition to those specified in section 29 as may from time to time be prescribed by the chief Customs-Authority; (b) such owner has paid the duties (if any) payable on such goods; and (c) such bill has been passed by the Customs-collector.

138. Before any warehoused goods or goods subject to excise-duties, or goods entitled to drawback of Customs-duties on exportation, or goods exportable only under particular rules or restrictions, are permitted to be exported, the owner shall, if required so to do, give security by bond in such sum, not exceeding twice the duty leviable on such goods, as the Customs-collector directs, with one sufficient surety, that such goods shall be duly shipped, exported and landed at the place for which they are entered outwards, or shall be otherwise accounted for to the satisfaction of such officer.

139. When goods are cleared for shipment on a shipping-bill presented after port-clearance has been granted, the Customs-collector may, if he thinks fit, levy, in addition to any duty to which such goods are ordinarily liable, a charge not exceeding—(a) in the case of goods liable to duties on fixed tariff valuations, one per cent. on the tariff value; (b) in the case of all other goods, one per cent. on the market value. Nothing in this section shall apply to any shipment of treasure or opium.

140. If any goods mentioned in a shipping-bill or manifest be not shipped, or be shipped and afterwards re-landed, the owner shall, before the expiration of five clear working days after the vessel on which such goods were intended to be shipped, or from which they were re-landed, has left the port, give information of such short-shipment or re-landing to the Customs-collector.

Upon an application being made to the Customs-collector, any duty levied upon goods not shipped, or upon goods shipped and afterwards re-landed, shall be refunded to the person on whose behalf such duty was paid: Provided that no such refund shall be allowed unless information has been given as above required.

141. If, after having cleared from any Customs-port any vessel, without having discharged her cargo, returns to such port, or puts into any other Customs-port, any owner of goods in such vessel, if he desires to land or tranship the same or any portion thereof for re-export, may, with the consent of the Master, apply to the Customs-collector in that behalf. The Customs-collector, if he grant the application, shall thereupon send an officer of Customs to watch the vessel, and to take charge of such goods during such re-landing or transhipment. Such goods shall not be allowed to be transhipped or re-exported free of duty by reason of the previous settlement of duty at the time of first export, unless they are lodged and remain until the time of re-export, under the custody of an officer of Customs, in a place appointed by the Customs collector, or are transhipped under such custody. All expenses attending such custody shall be borne by the owner.

142. In either of the cases mentioned in section 141, the Master of the vessel may enter such vessel inwards, and any owner of goods therein may, with the consent of the Master, land the same under the rules herein contained for the importation of goods. In every such case, any export-duty levied shall be refunded to, and any amount paid in drawback shall be recovered from such owner.

143. The Customs-collector may on application by the Master of any vessel, which is obliged before completing her voyage to put into any Customs-port for repairs, permit him to land the cargo, or any portion thereof, and to place it in the custody of an officer of Customs during such repairs, and to re-ship and export the same free of duty. All expenses attending such custody shall be borne by the Master.

CHAPTER XIV.—SPIRIT.

Exportation of spirit under bond for excise-duty.

144. The chief Customs-Authority may from time to time make rules prescribing the conditions on which spirit manufactured in British India may be removed from any licensed distillery for exportation without payment of excise-duty.

The person so removing any such spirit shall execute a bond with one or more sureties in the form marked C hereto annexed, or (when such form is inapplicable or insufficient) in such other form as the said Authority from time to time prescribes, conditioned that such duty shall be paid on all such spirit as is

(a) not exported within four months from the date of the bond, or

(b) exported to a Customs-port unless the payment of excise duty as provided by this chapter in respect thereof at the port of destination is within six months from the date of the bond proved to the satisfaction of the proper officer.

The chief Officer of Customs of the port of exportation may, on sufficient cause shown, extend for a further term not exceeding four months the period allowed for the exportation of any such spirit, or for the production of such proof that duty has been paid.

145. Spirit intended for exportation under bond for the excise-duty shall be taken from the distillery direct to the Custom-house, under passes to be granted for that purpose by the officers of Excise.

146. Spirit brought to the Custom-house for exportation under bond for the excise-duty shall, previous to shipment, be gauged and proved by an officer of Customs, and the quantity of spirit for which credit is to be given in the settlement of any bond shall be determined in the same manner.

147. Excise-duty shall be recoverable previously to shipment upon the excess (if any) of the quantity of spirit passed from a distillery over the quantity ascertained by gauge and proof at the Custom house, less an allowance for ullage and wastage at such rates as are from time to time prescribed by the Local Government and notified in the local official Gazette.

148. Spirit exported under bond for excise duty from any Customs-port to any other Customs-port, shall be charged at the port of importation with excise duty at the ordinary rate to which spirit of the like kind and strength is liable at such port.

149. Spirit brought to the Custom-house for exportation under bond for the excise-duty may, on payment of such duty, be removed for local consumption under passes to be granted for that purpose by the officers of Excise. Credit for every such payment shall be given in discharge of the bond to which it relates.

Drawback of excise duty on export of spirit.

150. A drawback of excise-duty paid on spirit manufactured in British India and exported to any Foreign port under the provisions of section 138, shall be allowed by the Customs-collector at the port of exportation :

Provided that the exportation be made within one year from the date of payment of such excise duty, and that the spirit, when brought to the Custom-house, be accompanied by a pass in which such payment is certified.

Such drawback shall be regulated by the strength and quantity of such spirit as ascertained by gauge and proof by an officer of customs.

Miscellaneous.

151. If spirit manufactured in British India upon which excise-duty has been paid is exported from one Customs port to another, and the rate of local excise-duty at the port of importation is higher than that already paid upon such spirit, a differential duty shall be charged thereupon, at such rate as the Local Government at such port may by notification in the local official Gazette from time to time prescribe.

152. Rum-shrub, cordial, and other such liquor prepared in a licensed distillery under the supervision of the surveyor or officer in charge of the distillery shall

be charged with excise-duty under this Act according to the quantity of spirit used in its preparation as ascertained by such surveyor or officer. The provisions of this Act respecting spirit, except such as relate to gauge and proof, shall apply to such liquor.

153. No drawback shall be allowed for any spirit on which duty has been paid, nor shall the duty due on any spirit under bond be remitted, unless the spirit is shipped from the Custom-house, and in a vessel whereon an officer of Customs has been appointed to superintend the receipt of export-cargo.

154. No spirit shipped for exportation shall be relanded without a special pass from an officer of Excise, in addition to any permission of an officer of Customs which may be required by the law for the time being in force.

155. When by any law for the time being in force a special duty is imposed on spirit rendered unfit for human consumption, the Local Government may from time to time make rules for ascertaining and determining what spirit imported into British India shall be deemed to have been effectually and permanently so rendered unfit and for causing such spirit to be so rendered, if necessary, by their own officers and at the expense of the person importing the same, before the Customs-duties leviable thereon are levied. In the absence of any such rules, or if any dispute arises as to their applicability, the chief Customs-Officer shall decide what spirit is subject only to the said special duty, and such decision shall be final.

CHAPTER XV.—COASTING TRADE.

156. Except as hereinafter provided, nothing in Chapters VII, IX, X, and sections 136, 139 and 141 to 143 inclusive of this Act shall apply to coasting vessels or to goods imported or exported in such vessels.

157. The Local Government may, from time to time, make rules consistent with the provisions of this Chapter, (a) extending any provision of the Chapters and Sections mentioned in section 156 with or without modification to any coasting vessels or to any goods imported or exported in such vessels; (b) exempting any such vessels or goods from any of the other provisions of this Act except those contained in this Chapter; (c) prescribing the conditions on which goods, or any specified class of goods, may be (1) carried in a coasting vessel, whether shipped at a Foreign port, or at a Customs-port, or at a place declared under section 12 to be a port; (2) shipped in a coasting vessel before all dutiable goods and goods brought in such vessel from a Foreign port have been unladen; (d) prohibiting the conveyance of any specified class of goods generally, or to or between specified ports in a coasting vessel.

158. Before any coasting vessel departs from the port of lading or when there are more ports of lading than one, the first port of lading, the Master shall fill in, sign and deliver to the Customs-collector a manifest in duplicate containing a true specification of all goods to be carried in such vessel, in such form, and accompanied by such shipping-bills or other documents as may from time to time be prescribed by the chief Customs-Authority. If the Customs-collector sees no objection to the departure of the vessel, he shall retain the duplicate and return the original manifest dated and signed by him together with its accompaniments; and such manifest shall be the port-clearance of the vessel unless, under the general orders of the chief Customs-Authority, a separate port-clearance be prescribed.

159. Within twenty-four hours after the arrival of any coasting vessel at any Customs-port, whether intermediate or final, and before any goods are there discharged, the manifest, together with the other documents referred to in section 158, shall be delivered to the Customs-collector, who shall note on the manifest the date of delivery.

If the vessel has touched at any Foreign port between such port of arrival and her last preceding Customs-port of departure, the Master shall append to the manifest a declaration to that effect, and shall also indicate on the manifest the portions (if any) of the cargo therein described which have been discharged, and subjoin thereto a true specification of all goods shipped at such port.

If the Customs-port of arrival be an intermediate port, and a portion only of the cargo is to be discharged thereat, the Master shall likewise so deliver an extract from the manifest signed by him, relating to such portion, and the Customs-collector shall, after verifying such extract, return to him the original manifest and all documents accompanying it except those relating to such portion.

If in any case the cargo actually on board any coasting vessel on her arrival at any Customs-port does not, owing to short-shipment, re-landing, or other cause, correspond with the specification thereof in the manifest returned to the Master under the second clause of section 158, such Master shall, before delivery of such manifest under this section, note thereon the particulars of the difference.

The Customs-collector, when satisfied with the manifest and other documents, shall grant an order to break bulk.

160. Before any coasting vessel departs from any Customs-port at which she has touched during her voyage, the Master shall re-deliver the original manifest to the Customs-collector, after indicating thereon the portions (if any) of the cargo therein described which have been discharged, and subjoining thereto a true specification of all goods shipped at such port. He shall also deliver a duplicate, signed by him, of the specification so subjoined.

If the Customs-collector sees no objection to the departure of the vessel, he shall proceed as prescribed in the second clause of section 158.

161. The Customs-collector may, for sufficient reason, refuse port-clearance to any coasting vessel declared to be bound to, or about to touch at, any Customs-port, unless the owner or Master gives a bond with such security as the Customs-collector deems sufficient for the production to the Customs-collector of a certificate from the proper officer of the port to which such vessel is said to be bound, of her arrival at such port within a reasonable time to be prescribed in each case by the Customs-collector.

162. When permission has been granted by the Customs-collector for the discharge of cargo from any coasting vessel—

(a) if the vessel has not touched at any intermediate Foreign port in the course of her voyage, and has not on board any dutiable goods, the cargo may be forthwith landed and removed by the owner, without entry thereof at the Custom-house and clearance for home-consumption, but subject to such general check and control as the chief Customs-Authority may from time to time by rules prescribe;

(b) if the vessel has so touched at any such port, or has on board any such goods, such vessel shall be subject to all the provisions of Chapter VII of this Act relating to vessels arriving and such goods, and until such goods have been duly discharged all other goods on board shall be subject to the provisions of Chapter IX of this Act relating to goods imported.

163. If any of the goods on board of any coasting vessel be subject to any excise-duty, they shall not be unladen without the permission of the proper officer of Excise.

164. Notwithstanding anything hereinbefore contained the chief Customs-Authority may authorize the Customs-collector to grant a general pass, on any conditions which such Authority thinks expedient, for the lading and clearance, and for the entry and unloading, of any coasting steam-vessel at any ports of despatch or des-

tinuation, or at any intermediate ports at which she touches for the purpose of receiving goods or passengers. Such pass shall be valid throughout British India, or for such ports only as may be specified therein.

Any such general pass may be revoked by order of the chief Customs-Authority by whom the grant thereof was authorized, by notice in writing under the hand of such Authority, delivered to the Master or to the owner of such steam-vessel, or to any of the crew on board.

165. The chief Customs-Authority may direct that the Master of any coasting vessel which is square-rigged or propelled by steam shall keep, or cause to be kept, a cargo-book, stating the name of the Master, the vessel, the port to which she belongs, and the port to which on each voyage she is bound.

At every port of lading such Master shall enter, or cause to be entered, in such book the name of such port, and an account of all goods there taken on board of such vessel, with a description of the packages, and the quantities and descriptions of the goods contained therein or stowed loose, and the names of the respective shippers and consignees, in so far as such particulars are known to him.

At every port of discharge of any such goods such Master shall enter, or cause to be entered, in such book the respective days on which such goods or any of them are delivered out of such vessel.

The respective times of departure from every port of lading, and of arrival at every port of discharge, shall in like manner be duly entered.

Every such Master shall, on demand, produce his cargo-book for the inspection of any officer of Customs, and such officer shall be at liberty to make any note or remark therein.

The chief Customs-Authority may, in the case of any vessel the Master whereof has been directed to keep a cargo-book under this section, dispense with the manifest required under sections 158, 159 and 160.

166. Any duly empowered officer of Customs may go on board of any coasting vessel in any port or place in British India, and may at any period of a voyage search any such vessel and examine all goods on board, and all goods then lading or unloading, and may demand the production of any document, which ought to be on board of any vessel.

The Customs-collector may further require that any such document belonging to any coasting vessel then in port shall be brought to him for inspection.

CHAPTER XVI.—OFFENCES AND PENALTIES.

167. The offences mentioned in the first column of the following schedule shall be punishable to the extent mentioned in the third column of the same with reference to such offences respectively :

Offences.	Section of this Act to which offence has reference.	Penalties.
1.—Contravening any rule made under this Act.	General	Penalty not exceeding five hundred rupees.
2.—If any goods be landed or shipped, or if an attempt be made to land or ship any goods, or if any goods be brought into any bay, river, creek or arm of the sea, for the purpose of being landed or shipped, at any port or place which, at the date of such landing, shipment, attempt or bringing, is not a port for the landing and shipment of goods,	11	such goods shall be liable to confiscation,
3.—If any person ship or land goods, or aid in the shipment or landing of goods, or knowingly keep or conceal, or knowingly permit or procure to be kept or concealed, any goods shipped or landed, contrary to the provisions of this Act ; or	General	such person shall be liable to a penalty not exceeding one thousand rupees,
if any person be found to have been on board of any vessel liable to confiscation on account of the commission of an offence under No. 2 of this section, while such vessel is within any bay, river, creek or arm of the sea which is not a port for the landing or shipment of goods,	11	
4.—If any vessel which has been within the limits of any port in British India with cargo on board, be afterwards found in any port, bay, river, creek or arm of the sea in British India, light or in ballast, and if the Master be unable to give a due account of the Customs-port where such vessel lawfully discharged her cargo,	11	such vessel shall be liable to confiscation,
5.—If any goods are put, without the authority of the proper officer of Customs, on board of any tug-steamer or pilot-vessel from any sea-going vessel inward-bound ; or if any goods are put, without such authority, out of any tug-steamer or pilot-vessel for the purpose of being put on board of any such vessel outward-bound ; or if any goods on which drawback has been granted are put, without such authority, on board of any tug-steamer or pilot-vessel for the purpose of being re-landed,	11	such goods shall be liable to confiscation, and the Master of every such tug-steamer or pilot-vessel shall be liable to a penalty not exceeding one thousand rupees,
6.—If any vessel arriving at, or departing from, any Customs-port fails, when so required, under section 17, to bring-to at any such station as has been appointed by the chief Customs-Authority for the boarding or landing of an officer of Customs,	17	the Master of such vessel shall be liable to a penalty not exceeding one thousand rupees,

OFFENCES AND PENALTIES—*contd.*

Offences.	Section of this Act to which offence has reference.	Penalties.
<p>7.—If any vessel arriving at any Customs-port, after having come to its proper place of mooring or unloading, removes from such place, except with the authority of the Conservator, obtained in accordance with the provisions of the Indian Ports Act, 1875, or other lawful authority, to some other place of mooring or unloading, or if any vessel not brought into port by a Pilot be not anchored or moored in accordance with any direction of the chief Customs-Authority under section 17,</p>	17	<p>the Master of such vessel shall be liable to a penalty not exceeding five hundred rupees, and the vessel, if not entered, shall not be allowed to enter until the penalty is paid.</p>
<p>8.—If any goods, the importation or exportation of which is for the time being prohibited or restricted by or under Chapter IV of this Act, be imported into or exported from British India contrary to such prohibition or restriction ; or if any attempt be made so to import or export any such goods ; or if any such goods be found in any package produced to any officer of Customs as containing no such goods ; or if any such goods, or any dutiable goods be found either before or after landing or shipment to have been concealed in any manner on board of any vessel within the limits of any port in British India ; or if any goods, the exportation of which is prohibited or restricted as aforesaid, be brought to any wharf in order to be put on board of any vessel for exportation contrary to such prohibition or restriction,</p>	18 & 19	<p>such goods shall be liable to confiscation ; and any person concerned in any such offence shall be liable to a penalty not exceeding three times the value of the goods, or not exceeding one thousand rupees.</p>
<p>9.—If upon an application to pass any goods through the Custom-house, any person not being the owner of such goods, and not having proper and sufficient authority from the owner, subscribes or attests any document relating to any goods on behalf of such owner,</p>	General	<p>such person shall be liable to a penalty not exceeding one thousand rupees.</p>
<p>10.—If any goods, on the entry of which for re-export drawback has been paid, are not duly exported or are unshipped or relanded at any Customs-port (not having been duly relanded or discharged under the provisions of this Act).</p>	42 & 43	<p>such goods, together with any vessel used in so unshipping or relanding them, shall be liable to confiscation ; and the Master of the vessel from which such goods are so unshipped or relanded, and any person by whom or by whose orders or means such goods are so unshipped or relanded, or who aids or is concerned in such unshipping or relanding, shall be liable to a penalty not exceeding three times the value of such goods, or not exceeding one thousand rupees.</p>

OFFENCES AND PENALTIES—*contd.*

Offences.	Section of this Act to which offence has reference.	Penalties.
11.—If any wine, spirit, provisions or stores be not laden on board of the vessel on board of which they should under the provisions of sections 45, 46, 47, or 48 be laden, or be unladen from such vessel without the permission of the proper officer of Customs.	44 & 48	such wine, spirit, provisions or stores shall be liable to confiscation.
12.—If any goods be entered for drawback, which are of less value than the amount of the drawback claimed,	50	such goods shall be liable to confiscation.
13.—If, in any river or port wherein a place has been fixed under section 53 by the Local Government, any vessel arriving passes beyond such place, before delivery of a manifest to the pilot, officer of Customs, or other person duly authorized to receive the same, or	53	the Master of such vessel shall be liable to a penalty not exceeding one thousand rupees.
14.—If the Master of any vessel arriving which remains outside or below any place so fixed wilfully omits, for the space of twenty-four hours after anchoring, to deliver a manifest as required by this Act.	"	such Master shall be liable to a penalty not exceeding one thousand rupees.
15.—If, after any vessel arriving has entered any Customs-port in which a place has not been fixed under section 53, the Master of such vessel wilfully omits, for the space of twenty-four hours after anchoring, to deliver a manifest as required by this Act.	54	ditto ditto.
16.—If any manifest delivered under sections 53, 54, 60, 63 or 66 is not signed by the person delivering the same and is not in the form or does not contain the particulars required by section 55 or 63, as the case may be, in so far as such particulars are applicable to the ship, cargo and voyage; or if any manifest so delivered does not contain a specification true to the best of such person's knowledge of all goods imported or to be exported in such vessel,	55 & 63	the person delivering such manifest shall be liable to a penalty not exceeding one thousand rupees.
17.—If any goods entered in the import manifest of a vessel are not found on board of the vessel; or if the quantity so found is short, and if such deficiency is not accounted for to the satisfaction of the officer in charge of the Customs-house;	"	
17.—If any goods entered in the import manifest of a vessel are not found on board of the vessel; or if the quantity so found is short, and if such deficiency is not accounted for to the satisfaction of the officer in charge of the Customs-house;	55 & 64	the Master of such vessel shall be liable to a penalty not exceeding twice the amount of duty chargeable on the missing or deficient goods, if they be dutiable and the duty leviable thereon can be ascertained, or otherwise to a penalty not exceeding five hundred rupees for every missing or deficient package or separate article.
18.—If any person required by this Act to receive a manifest from any Master of a vessel, refuses so to do, or fails to countersign the same or to enter thereon the particulars referred to in section 56,	53, 54 & 56	such person shall be liable to a penalty not exceeding five hundred rupees.
19.—If bulk be broken in any vessel previous to the grant by the Customs-collector, of an order for entry inwards or a special pass permitting bulk to be broken.	57 & 59	the Master of such vessel shall be liable to a penalty not exceeding one thousand rupees.

OFFENCES AND PENALTIES—*contd.*

Offences.	Section of this Act to which offence has reference.	Penalties.
<p>20.—If any bill of lading or copy required under section 58 is false and the Master is unable to satisfy the Customs-collector that he was not aware of the fact; or if any such bill or copy has been altered with fraudulent intent; or</p> <p>if the goods mentioned in any such bill or copy have not been <i>bonâ fide</i> shipped as shewn therein; or</p> <p>if any such bill of lading or any bill of lading of which a copy is delivered, has not been made previously to the departure of the vessel from the place where the goods referred to in such bill of lading were shipped; or</p> <p>if any part of the cargo has been staved, destroyed or thrown overboard; or if any package has been opened, and such part of the cargo or such package be not accounted for to the satisfaction of the Customs-collector,</p>	58	the Master of the vessel shall be liable to a penalty not exceeding one thousand rupees.
21.—If any Master of a vessel attempts to depart without a port-clearance,	62	such Master shall be liable to a penalty not exceeding five hundred rupees.
22.—If any vessel actually departs without a port-clearance,	62	the Master of such vessel shall be liable to a penalty not exceeding one thousand rupees.
23.—If any pilot takes charge of any vessel proceeding to sea, notwithstanding that the Master of such vessel does not produce a port-clearance,	62	such pilot, on conviction before a Magistrate, shall be liable to fine not exceeding one thousand rupees.
24.—If any Master of a vessel refuses to receive on board an officer of Customs deputed under section 57,	68	such Master shall be liable to a penalty not exceeding five hundred rupees for each day during which such officer is not received on board; and the vessel if not entered shall not be allowed to enter until such penalty is paid.
25.—If any Master of a vessel refuses to receive on board one servant of such officer or to provide such officer and servant with suitable shelter and accommodation, and with a due allowance of fresh water, and with the means of cooking on board.	68	such Master shall, in each such case, be liable to a penalty not exceeding five hundred rupees.
<p>26.—If any Master of a vessel refuses to allow such vessel, or any box, place or closed receptacle in such vessel, to be searched when so required by an officer of Customs bearing a written order to search; or</p> <p>if an officer of Customs places any lock, mark or seal upon any goods in a vessel, and such lock, mark or seal is wilfully opened altered or broken, before due delivery of such goods; or</p> <p>if any such goods are secretly conveyed away;</p> <p>or</p>	69	the Master of such vessel shall be liable, upon conviction before a Magistrate, to a fine not exceeding one thousand rupees.

OFFENCES AND PENALTIES—*contd.*

Offences.	Section of this Act to which offence has reference.	Penalties.
if any hatchway or entrance to the hold of a vessel, after having been fastened down by an officer of Customs, is opened without his permission.		
27.—If the Master of any vessel laid up by the withdrawal of the officer of Customs shall, before application is made by him for an officer of Customs to superintend the receipt of cargo, cause or suffer to be put on board of such vessel any goods whatever, in contravention of Section 70,	70.	such Master shall be liable to a penalty not exceeding one thousand rupees, and the goods, if protected by a pass, shall be liable to be re-landed for examination at the expense of the vessel, and, if not protected by a pass shall be liable to confiscation.
28.—If any Master of a vessel in any case other than that provided for by No. 27 causes or suffers any goods to be discharged, shipped, or water-borne contrary to any of the provisions of section 70, 72 or 75,	70, 72 & 75	such Master shall be liable to a penalty not exceeding one thousand rupees; and all goods so discharged, shipped, or water-borne shall be liable to confiscation.
29.—If when a boat-note is required by section 76 any goods water-borne for the purpose of being landed from any vessel, and warehoused or passed for importation, or of being shipped for exportation, be found without such note; or if any goods are found on board any boat in excess of such boat-note whether such goods are intended to be landed from, or to be shipped on board of, any vessel,	76	such goods shall be liable to confiscation; and the person by whose authority the goods are being landed or shipped, and the person in charge of the boat, shall each be liable to a penalty not exceeding twice the amount of duty (if any) leviable on the said goods.
30.—If any person refuses to receive, or fails to sign, or to note the prescribed particulars upon, any boat-note, as required by section 76, or if any Master or officer of a vessel receiving the same fails to deliver it when required so to do by any officer of Customs authorized to make such requisition.	76	such person, master or officer shall be liable to a penalty not exceeding five hundred rupees.
31.—If any goods are, without permission, shipped or water-borne to be shipped or are landed except from or at a wharf or other place duly appointed for the purpose; or	73	such goods shall be liable to confiscation; and the person by whose authority the goods are shipped, landed, water-borne, or transhipped, and the person in charge of the vessel employed conveying them, shall each be liable to a penalty not exceeding twice the amount of the duty (if any) leviable on such goods.
if any goods water-borne for the purpose of being landed or shipped are not landed or shipped without unnecessary delay; or	77	
if the boat containing such goods be found out of the proper track between the vessel and the wharf or other proper place of landing or shipping, and such deviation be not accounted for to the satisfaction of the Customs-collector; or		
if any goods are transhipped contrary to the provisions of section 78.	78	
32.—If, after the issue of a notification under section 79 with regard to any port, any goods are found within the limits of such port on board of any boat not duly licensed and registered,	79	such goods, unless they are covered by a special permit from the Customs-collector, shall be liable to confiscation, and the owner or the person in charge of the boat shall be liable to a penalty not exceeding one hundred rupees.

OFFENCES AND PENALTIES—*contd.*

Offences.	Section of this Act to which offence has reference.	Penalties.
33.—If any Master of a vessel discharges or suffers to be discharged any goods not duly entered in the manifest of such vessel.	55 & 82	such Master shall be liable to a penalty not exceeding one thousand rupees.
34.—If any goods are found concealed in any place, box or closed receptacle in any vessel, and are not duly accounted for to the satisfaction of the officer in charge of the Custom-house,	General	such goods shall be liable to confiscation,
35.—If any goods are found on board in excess of those entered in the manifest, or not corresponding with the specification therein contained,	55 & 82	such goods shall be liable to confiscation, or to be charged with such increased rates of duty as the chief officer of Customs directs.
36.—If, after any goods have been landed and before they have been passed through the Custom-house, the owner removes or attempts to remove them, with the intention of defrauding the revenue,	86 & 87	such goods shall be liable to confiscation; or if the goods cannot be recovered, the owner shall be liable, in addition to full duty, to a penalty not exceeding twice the amount of such duty, if the goods be dutiable and the duty leviable thereon can be ascertained; or, otherwise to a penalty not exceeding one thousand rupees for every missing or deficient package or separate article.
37.—If it be found, when any goods are entered at, or brought to be passed through, a Custom-house, either for importation or exportation, that (a) the packages in which they are contained differ widely from the description given in the bill of entry or application for passing them; or (b) the contents thereof have been wrongly described in such bill or application as regards the denominations, characters or conditions according to which such goods are chargeable with duty, or are being imported or exported; or (c) the contents of such packages have been mis-stated in regard to sort, quality, quantity or value; or (d) goods not stated in the bill of entry or application have been concealed in, or mixed with, the articles specified therein, or have apparently been packed so to deceive the officers of Customs, and such circumstance is not accounted for to the satisfaction of the Customs-collector,	87 & 137	such packages, together with the whole of the goods contained therein, shall be liable to confiscation, and every person concerned in any such offence shall be liable to a penalty not exceeding one thousand rupees.
38.—If, when goods are passed by tale or by package, any omission or misdescription thereof tending to injure the revenue be discovered,	86 & 94	the person guilty of such omission or misdescription shall be liable to a penalty not exceeding ten times the amount of duty which might have been lost to Government by such omission or mis-description.

OFFENCES AND PENALTIES—*contd.*

Offences.	Section of this Act to which offence has reference.	Penalties.
39.—If, without entry duly made, any goods are taken or passed out of any Custom-house or wharf,	86	tion, unless it be proved to the satisfaction of the officer in charge of the Custom-house that the variance was accidental. the person so taking or passing such goods shall, in every such case, be liable to a penalty not exceeding five hundred rupees, and such goods shall be liable to confiscation.
40.—If any prohibited or dutiable goods are found, either before or after landing, concealed in any passenger's baggage,	General.	such passenger shall be liable to a penalty not exceeding five hundred rupees, and such goods shall be liable to confiscation.
41.—If any goods entered to be warehoused are carried into the warehouse, unless with the authority, or under the care, of the proper officers of Customs, and in such manner, by such persons, within such time, and by such roads or ways, as such officers direct,	93	such goods shall be liable to confiscation, and any person so carrying them shall be liable to a penalty not exceeding one thousand rupees.
42.—If any goods entered to be warehoused are not duly warehoused in pursuance of such entry, or are withheld, or removed from any proper place of examination before they have been examined and certified by the proper officer,	94	such goods shall be deemed not to have been duly warehoused, and shall be liable to confiscation.
43.—If any warehoused goods be not warehoused in accordance with sections 94 and 95,	94 & 95	such goods shall be liable to confiscation.
44.—If the licensee of any private warehouse licensed under this Act does not open the same when required so to do by any officer entitled to have access thereto, or, upon demand made by any such officer refuses access to any such officer,	97	such licensee shall be liable to a penalty not exceeding one thousand rupees, and shall further be liable to have his license forthwith cancelled.
45.—If the keeper of any public warehouse, or the licensee of any private warehouse, neglects to stow the goods warehoused therein, so that easy access may be had to every package and parcel thereof,	Chap. IX.	such keeper or licensee shall, for every such neglect, be liable to a penalty not exceeding fifty rupees.
46.—If the owner of any warehoused goods, or any person in the employ of such owner clandestinely opens any warehouse, or, except in presence of the proper officer of Customs, gains access to his goods,	99	such owner or person shall, in every such case, be liable to a penalty not exceeding one thousand rupees.
47.—If any warehoused goods are opened in contravention of the provisions of section 98; or if any alteration be made in such goods or in the packing thereof, except as provided in section 100,	98 & 100	such goods shall be liable to confiscation.
48.—If any goods lodged in a private warehouse are found at the time of delivery therefrom to be deficient, and such deficiency is not due solely ullage or wastage, as allowed under sections 116 and 117.	123	the licensee of such warehouse shall, unless the deficiency be accounted for to the satisfaction of the Customs-collector, be liable to a penalty equal

OFFENCES AND PENALTIES—*contd.*

Offences.	Section of this Act to which offence has reference.	Penalties.
49.—If the keeper of any public warehouse, or the licensee of any private warehouse, fails, on the requisition of any officer of Customs, to produce any goods which have been deposited in such warehouse, and which have not been duly cleared and delivered therefrom, and is unable to account for such failure to the satisfaction of the Customs-collector.	123	to five times the duty chargeable on the goods so deficient, such keeper or licensee shall, for every such failure, be liable to pay the duties due on such goods, and also a penalty not exceeding fifty rupees in respect of every package or parcel so missing or deficient.
50.—If any goods, after being duly warehoused, are fraudulently concealed in, or removed from, the warehouse, or abstracted from any package, or transferred from one package to another, or otherwise, for the purpose of illegal removal or concealment,	Chap. IX.	such goods shall be liable to confiscation, and any person concerned in any such offence shall be liable to a penalty not exceeding one thousand rupees.
51.—If any goods lodged in a private warehouse are found to exceed the registered quantity,	Ditto	such excess, unless accounted for to the satisfaction of the officer in charge of the Custom-house, shall be charged with five times the ordinary duty thereon.
52.—If any goods be removed from the warehouse in which they were originally deposited, except in the presence, or with the sanction, of the proper officer, or under the proper authority for their delivery,	Ditto	such goods shall be liable to confiscation, and any person so removing them shall be liable to a penalty not exceeding one thousand rupees.
53.—If any person illegally takes any goods out of any warehouse without payment of duty, or aids, assists or is concerned therein,	Ditto	such person shall be liable to a penalty not exceeding one thousand rupees.
54.—If any person contravenes any rule regarding the process of transshipment made by the Local Government, or	130	such person shall be liable to a penalty not exceeding one thousand rupees; and any
any prohibition or order relating to transshipment notified by the Governor-General in Council, or	134	goods in respect of which such offence has been committed shall be liable to confiscation.
tranships goods not allowed to be transhipped,	136	the Master of such vessel shall be liable to a penalty not exceeding one thousand rupees.
55.—If any goods be taken on board of any vessel at any Customs-port in contravention of section 136,	137	the Master of such vessel shall be liable to a penalty not exceeding fifty rupees for every
56.—If any goods not notified in a duly passed shipping-bill are taken on board of any vessel, contrary to the provisions of section 137.	140	package of such goods.
57.—If any goods specified in the manifest of any vessel, or in any shipping-bill, are not duly shipped before the departure of such vessel, or are reloaded;	141	the owner of such goods shall be liable to a penalty not exceeding one hundred rupees: and such goods shall be liable to confiscation.
and notice of such short shipment or reloading be not given as required by section 140,		
58.—If any goods duly shipped on board of any vessel be landed, except under section 141, 142 or 143, at any place other than that for which they have been cleared,		the Master of such vessel shall, unless the landing be accounted for to the satisfaction of the Customs-collector be liable to a penalty not exceeding three times the value of such goods so landed.

OFFENCES AND PENALTIES—*contd.*

Offences.	Section of this Act to which offence has reference.	Penalties.
59.—If any goods on account of which drawback has been paid be not found on board of any vessel referred to in section 142,	141	the Master of such vessel shall be liable to a penalty not exceeding the entire value of such goods unless the fact be accounted for to the satisfaction of the Customs-collector.
60.—If any person, without a special pass from any officer of excise at the place of exportation, relands or attempts to reland any spirits shipped for exportation,	155	such person shall be liable to a penalty not exceeding five hundred rupees.
61.—If any person wilfully contravenes any rule relating to spirits made under section 155,	154	such person shall be liable to a penalty not exceeding five hundred rupees; and all such spirit shall be liable to confiscation.
62.—If, in contravention of any rules made under section 157, any goods are taken into, or put out of, or carried in, any coasting vessel; or if any such rules be otherwise infringed,	157	the Master of such vessel shall be liable to a penalty not exceeding one thousand rupees.
63.—If, contrary to any such rules, any coasting vessel touches at any Foreign port, or deviates from her voyage, unless forced by unavoidable circumstances; or if the Master of any such vessel which has touched at a Foreign port fails to declare the same in writing to the Customs-collector at the Customs-port at which such vessel afterwards first arrives,	159	the Master of such vessel shall be liable to a penalty not exceeding one thousand rupees; and if any goods liable to export duty have been landed from, or any goods liable to import duty have been shipped in, such vessel at such Foreign port such Master shall further be liable to a penalty not exceeding three times the duty which would have been leviable on such goods if they had been exported from or imported at a Customs port to or from Foreign port, as the case may be.
64.—If in the case of any coasting vessel any of the provisions of section 158, 159 or 160 are not complied with,	158, 159 & 160	the Master of such vessel shall in each such case be liable to a penalty not exceeding five hundred rupees.
65.—If the person executing any bond given under section 161 fail to produce the certificate mentioned in the same section, or to show sufficient reason for its non-production,	161	such person shall be bound to pay a penalty equal to double the amount of Customs-duties which would have been chargeable on the export-cargo of the vessel had she been declared to be bound to a Foreign port.
66.—If the Master of any coasting vessel violates any of the conditions under which a general pass for such vessel has been granted,	164	such Master shall be liable to a penalty not exceeding one thousand rupees.
67.—If any Master of a coasting vessel contravenes any of the provisions of section 165,	165	such Master shall be liable to a penalty not exceeding five hundred rupees.
68.—If upon examination, any package entered in the cargo-book required by section 165, as containing dutiable goods, is found not to contain such goods: or	165	such package, with the contents, shall be liable to confiscation.

OFFENCES AND PENALTIES—*contd.*

Offences.	Section of this Act to which offence has reference.	Penalties.
<p>if any package is found to contain dutiable goods not entered, or not entered as such, in such book,</p> <p>69.—If the Master of any coasting vessel required under section 165 to keep a cargo book fails correctly to keep, or to cause to be kept, such book, or to produce the same on demand; or</p> <p>if at any time there be found on board of any such vessel any goods not entered in such book as laden, or any goods noted as delivered; or</p> <p>if any goods entered as laden and not noted as delivered, be not on board.</p>	165	such Master shall be liable to a penalty not exceeding five hundred rupees.
<p>70.—If, contrary to the provisions of this or any other law for the time being in force relating to the Customs, any goods are laden on board of any vessel in any Customs-port and carried coastwise; or</p> <p>if any goods which have been brought coastwise are so unladen in any such port; or</p> <p>if any goods are found on board of any coasting vessel without being entered in the manifest or cargo book or both (as the case may be) of such vessel,</p>	Chapter XV.	such goods shall be liable to confiscation, and the Master of such vessel shall be liable to a penalty not exceeding five hundred rupees.
<p>71.—If the Master of any coasting vessel refuses to bring any document to the Customs-collector when so required under section 166.</p> <p>72.—If any person makes or signs, or uses, any declaration or document used in the transaction of any business relating to the Customs, knowing such declaration or document to be false in any particular; or counterfeits, falsifies or fraudulently alters or destroys any such document, or any seal, signature, initials or other mark, made or impressed by any officer of Customs in the transaction of any business relating to the Customs; or being required under this Act to produce any document, refuses or neglects to produce such document; or</p> <p>being required under this Act to answer any question put to him by an officer of Customs, does not truly answer such question,</p>	166	such Master shall be liable to a penalty not exceeding two hundred rupees.
<p>73.—If any person on board of any vessel or boat in any Customs-port, or who has landed from any such vessel or boat, upon being asked by any such officer whether he has dutiable or prohibited goods about his person or in his possession, declares that he has not, and if any such goods are, after such denial, found about his person, or in his possession,</p>	General	such person shall on conviction of any such offence before a Magistrate be liable to a fine not exceeding one thousand rupees.
<p>74.—If any officer of Customs requires any person to be searched for dutiable or prohibited goods, or to be detained, without having reasonable ground to believe that he has such goods about his person, or has been guilty of an offence relating to the Customs.</p>	169	such officer shall, on conviction before a Magistrate, be liable to a fine not exceeding five hundred rupees.

OFFENCES AND PENALTIES—*contd.*

Offences.	Section of this Act to which offence has reference.	Penalties.
75.—If any officer of Customs, or other person duly employed for the prevention of smuggling, is guilty of a wilful breach of the provisions of this Act,	General	such officer or person shall, on conviction before a Magistrate, be liable to simple imprisonment for any term not exceeding two years, or to fine, or to both.
76.—If any officer of Customs, or other person duly employed for the prevention of smuggling, practises, or attempts to practise, any fraud for the purpose of injuring the Customs-revenue, or abets or connives at any such fraud, or any attempt to practise any such fraud.	General	Ditto ditto.
77.—If any Police-officer, whose duty it is under section 180, to send a written notice or cause goods to be conveyed to a Custom-house, neglects so to do,	180	such officer shall, on conviction before a Magistrate, be liable to a penalty not exceeding one hundred rupees.
78.—If any person intentionally obstructs any officer of Customs or other person duly employed for the prevention of smuggling, in the exercise of any powers given under this Act to such officer or person,	General	such person shall on conviction before a Magistrate, be liable to imprisonment for any term not exceeding six months, or to a fine not exceeding one thousand rupees, or to both.
79.—If any officer of customs except in the discharge in good faith of his duty as such officer, discloses any particulars learned by him in his official capacity in respect of any goods, or shows any samples delivered to him in such capacity, or if any officer of Customs except as permitted by this Act, parts with the possession of any samples delivered to him in his official capacity,	195	he shall be liable to a penalty not exceeding one thousand rupees.
80.—If any person, without the approval of the Customs-collector under Section 202, acts as an agent for the transaction of business as therein mentioned,	202	such person shall be liable to a penalty not exceeding five hundred rupees.

Nothing in the second column of the above schedule shall be deemed to have the force of law.

168. The confiscation of any goods under this Act includes any package in which they are found, and all the other contents thereof.

Every vessel, cart or other means of conveyance, and every horse or other animal used in the removal of any goods liable to confiscation under this Act shall in like manner be liable to confiscation.

The confiscation of any vessel under this Act includes her tackle, apparel and furniture.

CHAPTER XVII.—PROCEDURE RELATING TO OFFENCES, APPEALS, &c.

169. Any officer of Customs duly employed in the prevention of smuggling may search any person on board of any vessel in any port in British India, or any person who has landed from any vessel :

Provided that such officer has reason to believe that such person has dutiable or prohibited goods secreted about his person.

170. When any officer of Customs is about to search any person under the provisions of section 169, such person may require the said officer to take him, previous to search, before the nearest Magistrate or Customs-collector.

If such requisition be made, the officer of Customs may detain the person making it until he can bring him before the nearest Magistrate or Customs-collector.

The Magistrate or Customs-collector before whom any person is so brought shall, if he see no reasonable ground for search, forthwith discharge such person; but if otherwise, shall direct that the search be made.

A female shall not be searched by any but a female.

171. Any duly empowered officer of Customs or other person duly employed for the prevention of smuggling, may stop and search for smuggled goods any vessel, cart or other means of conveyance; provided that he has reason to believe that smuggled goods are contained therein.

172. Any Magistrate may, on application by a Customs-collector, stating his belief that dutiable or prohibited goods are secreted in any place within the local limits of the jurisdiction of such Magistrate, issue a warrant to search for such goods.

Such warrant shall be executed in the same way, and shall have the same effect, as a search-warrant issued under the law relating to Criminal Procedure.

173. Any person against whom a reasonable suspicion exists that he has been guilty of an offence under this Act, may be arrested in any place, either upon land or water, by any officer of Customs or other person duly employed for the prevention of smuggling.

174. Every person arrested on the ground that he has been guilty of an offence under this Act, shall forthwith be taken before the nearest Magistrate or Customs-collector.

175. When any such person is taken before a Magistrate, such Magistrate may, if he thinks fit, either commit him to gaol or order him to be kept in the custody of the Police for such time as is necessary to enable such Magistrate to communicate with the proper officers of Customs;

Provided that any person so arrested, committed, or kept shall be released on giving security to the satisfaction of the Magistrate to appear at such time and place as such Magistrate appoints in this behalf.

176. If any person liable to be arrested under this Act, is not arrested at the time of committing the offence for which he is so liable, or after arrest, makes his escape, he may at any time afterwards be arrested and taken before a Magistrate, to be dealt with as if he had been arrested at the time of committing such offence.

177. When any person employed on the crew of any of the ships of Her Majesty's Navy, Indian Marine or Marine Survey is arrested under this Act, the arresting officer shall forthwith give notice thereof to the commanding officer of the ship, who shall thereupon place such person in security on board of such ship, until the arresting officer has obtained a warrant from a Magistrate for bringing up such person to be dealt with according to law.

The Magistrate shall grant such warrant upon complaint made to him by the arresting officer, stating the offence for which the person is detained.

178. Any thing liable to confiscation under this Act may be seized in any place, either upon land or water, by any officer of Customs or other person duly employed for the prevention of smuggling.

179. All things seized on the ground that they are liable to confiscation under this Act shall, as soon as conveniently may be, be delivered into the care of any Customs officer authorized to receive the same.

If there be no such officer at hand, all such things shall be carried to and deposited at the Custom-house nearest to the place of seizure.

If there be no Custom-house within a convenient distance, such things shall be deposited at the nearest place appointed by the chief Customs-Authority for the deposit of things so seized.

180. When any things liable to confiscation under this Act are seized by any Police-officer on suspicion that they have been stolen, he may carry them to any Police-station or Court at which a complaint connected with the stealing or receiving of such things has been made, or an enquiry connected with such stealing or receiving is in progress, and there detain such things until the dismissal of such complaint or the conclusion of such enquiry or of any trial thence resulting.

In every such case the Police-officer seizing the things shall send written notice of their seizure and detention to the nearest Custom-house; and immediately after the dismissal of the complaint or the conclusion of the enquiry or trial, he shall cause such things to be conveyed to, and deposited at, the nearest Custom-house, to be there proceeded against according to law.

181. When any thing is so seized, or any person is arrested, under this Act, the officer or other person making such seizure or arrest shall, on demand of the person in charge of the thing so seized, or of the person so arrested, give him a statement in writing of the reason for such seizure or arrest.

182. In every case except the cases mentioned in section 167, Nos. 26, 72 and 74 to 76 both inclusive, in which, under this Act, anything is liable to confiscation or to increased rates of duty; or any person is liable to a penalty, such confiscation, increased rate of duty or penalty may be adjudged—

(a) without limit, by a Deputy Collector of Customs, or a Customs-collector;

(b) up to confiscation of goods not exceeding two hundred and fifty rupees in value, and imposition of penalty or increased duty not exceeding one-hundred rupees by an Assistant Commissioner or Assistant Collector of Customs;

(c) up to confiscation of goods not exceeding fifty rupees in value, and imposition of penalty or increased duty not exceeding ten rupees, by such other subordinate officers of Customs as the Local Government may, from time to time, empower in that behalf in virtue of their office:

Provided that the Local Government may, in the case of any officer, performing the duties of Customs-collector, limit his powers to those indicated in clause (b) or in clause (c) of this section, and may confer on any officer by name, or in virtue of his office, the powers indicated in clauses (a), (b) or (c) of this section.

183. Whenever confiscation is authorized by this Act, the officer adjudging it shall give the owner of the goods an option to pay in lieu of confiscation such fine as the officer thinks fit.

184. When anything is confiscated under section 182, such thing shall thereupon vest in Her Majesty. The officer adjudging confiscation shall take and hold possession of the thing confiscated, and every officer of Police, on the requisition of such officer, shall assist him in taking and holding such possession.

185. If any vessel actually departs without a port-clearance, or after failing to bring-to when required at any station appointed under section 17, the penalty to which the Master of such vessel is liable may be adjudged by the chief Customs Officer of any Customs-port to which such vessel proceeds, or in which she is, and in

the case of Aden, by such officer as the Governor of Bombay in Council appoints in this behalf.

A certificate of such departure or failure to bring-to when required, purporting to be signed by the chief Customs Officer of the port from which the vessel is stated to have so departed, shall be *prima facie* proof of the fact so certified.

186. The award of any confiscation, penalty or increased rate of duty under this Act by an officer of Customs shall not prevent the infliction of any punishment to which the person affected thereby is liable under any other law.

187. All offences against this Act, other than those cognizable under section 182 by officers of Customs may be tried summarily by a Magistrate.

188. Any person deeming himself aggrieved by any decision or order passed by an officer of customs under this Act may, within three months from the date of such decision or order, appeal therefrom to the chief Customs-Authority, or, in such cases as the Local Government directs, to any officer of Customs not inferior in rank to a Customs Collector and empowered in that behalf by name or in virtue of his office by the Local Government.

Such authority or officer may thereupon make such further enquiry and pass such order as he thinks fit, confirming, altering or annulling the decision or order appealed against :

Provided that no such order in appeal shall have the effect of subjecting any person to any greater confiscation, penalty or rate of duty than has been adjudged against him in the original decision or order.

Every order passed in appeal under this section shall, subject to the power of revision conferred by section 191, be final.

189. Where the decision or order appealed against relates to any duty or penalty leviable in respect of any goods, the owner of such goods, if desirous of appealing against such decision or order, shall, pending the appeal, deposit in the hands of the Customs-collector at the port where the dispute arises the amount demanded by the officer passing such decision or order.

When delivery of such goods to the owner thereof is withheld merely by reason of such amount not being paid, the Customs-collector shall upon such deposit being made cause such goods to be delivered to such owner.

If upon any such appeal it is decided that the whole or any portion of such amount was not leviable in respect of such goods, the Customs-collector shall return such amount or portion (as the case may be) to the owner of such goods on demand by such owner.

190. If, upon consideration of the circumstances under which any penalty, increased rate of duty or confiscation has been adjudged under this Act by an officer of Customs, the chief Customs Authority is of opinion that such penalty, increased rate or confiscation ought to be remitted in whole or in part, or commuted, such Authority may remit the same or any portion thereof, or may, with the consent of the owner of any goods ordered to be confiscated, commute the order of confiscation to a penalty not exceeding the value of such goods.

191. The Local Government may on the application of any person aggrieved by any decision or order passed under this Act by any officer of Customs or chief Customs-Authority, and from which no appeal lies, reverse or modify such decision or order.

192. When any fine, penalty or increased rate of duty is leviable under this Act, the goods in respect of which such fine, penalty or rate is leviable shall not be removed by the owner until such fine, penalty or rate is paid.

If any person has become liable to any such fine, penalty or rate in respect of any goods, the Customs-collector may detain any other goods belonging to such person passing through the custom-house until such fine, penalty or rate is paid.

193. When a penalty or increased rate of duty is adjudged against any person under this Act by any officer of Customs, such officer, if such penalty or increased rate be not paid, may levy the same by sale of any goods of the said person which may be in his charge, or in the charge of any other officer of customs.

When an officer of customs who has adjudged a penalty or increased rate of duty against any person under this Act is unable to realise the unpaid amount thereof from such goods, such officer may notify in writing to any Magistrate within the local limits of whose jurisdiction such person or any goods belonging to him may be, the name and residence of the said person and the amount of penalty or increased rate of duty unrecovered; and such Magistrate shall thereupon proceed to enforce payment of the said amount in like manner as if such penalty or increased rate had been a fine inflicted by himself.

CHAPTER XVIII.—MISCELLANEOUS.

194. Any officer of Customs may open any package, and examine any goods brought by sea to, or shipped or brought for shipment at any Customs-port.

195. The Customs-collector may, on the entry or clearance of any goods, or at any time while such goods are being passed through the Custom-house, take samples of such goods, for examination or for ascertaining the value thereof on which duties are payable, or for any other necessary purpose.

Every such sample shall, if practicable, be at the option of the owner either restored to him, or sold and the proceeds accounted for to him.

196. The unshipping, carrying, shipping and landing of all goods, and the bringing of them to the proper place for examination or weighing, and the putting of them into and out of the scales, and the opening, unpacking, baling, sorting, lotting, marking and numbering of goods, where such operations are necessary or permitted; and the removing of goods to and the placing of them in, the proper place of deposit, shall be performed by or at the expense of the owner of such goods.

197. No owner of goods shall be entitled to claim from any officer of Customs compensation for any loss or damage occurring to such goods at any time while they remain or are lawfully detained in any Custom-house, or on any Custom-house wharf, or under charge of any officer of Customs, unless it be proved that such loss or damage was occasioned by the neglect or wilful act of such officer of Customs.

198. No proceeding other than a suit shall be commenced against any person for anything purporting to be done in pursuance of this Act without giving to such person a month's previous notice in writing of the intended proceeding, and of the cause thereof; or after the expiration of three months from the accrual of such cause.

199. The chief Customs-Authority may from time to time fix the period after the expiration of which goods left on any Custom-house wharf, or other authorized landing place or part of the Custom-house premises, shall be subject to payment of fees, and the amount of such fees.

200. A duplicate of any certificate, manifest, bill or other Custom-house document may, on payment of a fee not exceeding ten rupees, be furnished, at the discretion of the Customs-collector, to any person applying for the same, if the Customs-collector is satisfied that no fraud has been committed or is intended by the applicant.

201. Except in the cases provided for by sections 36, 55, 63 and 94, the Customs-collector may in his discretion, upon payment of one rupee, authorize any document, after it has been entered and recorded in the Custom-house, to be amended.

202. No person authorized to act as an agent for the transaction of any business relating to the entrance or clearance of any vessel, or the import or export of goods or baggage, shall so act in any Custom-house, unless such authorization is approved by the Customs-collector.

Such officer may require any person so authorized to give a bond with sufficient security, in any sum not exceeding five thousand rupees, for his faithful behaviour as regards the Custom-house regulations and officers.

Such officer may, in case of misbehaviour of the person so authorized, suspend or withdraw such approval, but an appeal against every such suspension or withdrawal shall lie to the chief Customs-Authority, whose decision thereon shall be final.

Every appeal under this section shall be made within one month of the suspension or withdrawal.

203. When any person applies to any officer of Customs for permission to transact any specified business with him on behalf of any other person, such officer may require the applicant to produce a written authority from the person on whose behalf such business is to be transacted, and in default of the production of such authority may refuse such permission.

The clerk, servant, or agent, of any person or mercantile firm, may transact business generally at the Custom-house on behalf of such person or firm; Provided that the Customs-collector may refuse to recognize such clerk, servant or agent unless such person or a member of such firm identifies such clerk, servant or agent to the Customs-collector as empowered to transact such business, and deposits with the Customs-collector an authority in writing duly signed, authorizing such clerk, servant or agent to transact such business on behalf of such person or firm.

204. All rules made under this Act shall be notified in the official Gazette, and shall thereupon have the force of law. All such rules for the time being in force shall be collected, arranged and published at intervals not exceeding two years, and shall be sold to the public at a reasonable price.

205. Any notification made by any authority under powers conferred by this Act, may be cancelled in like manner by the same authority.

206. If in any case relating to the removal of goods from a warehouse without payment of duty, the person offending be an officer of Customs not acting in execution of his duty, and be prosecuted to conviction by the owner of such goods, no duty shall be payable in respect of such goods. For any damage so occasioned by such officer, the Customs-collector shall, with the sanction of the chief Customs-Authority, make due compensation to such owner.

207. Nothing in this Act shall affect any law for the time being in force relating to the Commissioners for making improvements in the Port of Calcutta or the Trustees of the Port of Bombay respectively.

SCHEDULE.

PART I.—ACTS OF THE GOVERNOR-GENERAL OF INDIA IN COUNCIL.

Number and year.	Title.	Extent of repeal.
XXI of 1856 ...	An Act to consolidate and amend the law relating to the Abkaree Revenue in the Presidency of Fort William in Bengal.	Section eight. Sections ten to fifteen, both inclusive, the last sentence of section sixteen and the form of bond annexed to the Act.
VI of 1863 ...	An Act to consolidate and amend the laws relating to the administration of the Department of Sea Customs in India.	The whole.
X of 1863 ...	An Act to amend the Consolidated Customs Act.	The whole.
XVII of 1869 ...	An Act to shorten the time for landing cargo,	The whole.
XIV of 1871 ...	An Act for the further amendment of the Consolidated Customs Act.	The whole.
VI of 1873 ...	An Act to amend the law relating to the Transhipment of goods imported by steamer, and for other purposes.	The whole.
XVI of 1875 ...	An Act to amend the law relating to Customs Duties, and for other purposes.	Sections five, six, seven and twelve.

PART II.—FORMS.

A.—FORM OF BOND FOR IMPORT DUTY.

(See section 92).

BOND.

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No.
We, *A. B.*,now of
; and *C. D.*

of the same place, are jointly and severally bound to Her Majesty's Secretary of State for India in Council in the sum of Government rupees to be paid to the said Secretary of State in Council, for which payment we jointly and severally bind ourselves and our legal representatives.

(date)
(Signed)

bounden
officer in charge of the Custom-house at
for and obtained permission to lodge in the warehouse
period of the following goods, that is to say—
imported by sea from
ship
as No. of the Register of Goods imported by Sea ;

The above
having applied to the

for a

on board of the

and entered in the Custom-house Books

The condition of this Bond is, that ;

If the or their legal representatives, shall observe all the rules prescribed in The Sea Customs Act, 1878, to be observed by owners of goods warehoused, and by persons obtaining permission to warehouse goods under the provisions thereof;

And if the said or their legal representatives, shall pay to the officer in charge of the Custom-house at the port of all dues, whether Customs-duties, warehouse-dues, rent or other lawful charges which shall be demandable on the said goods, or on account of penalties incurred in respect to them, within

from the date of this Bond, or within such further time as the chief Customs-Authority of shall allow in that behalf, together with interest on every such sum at the rate of six per cent. per annum from the date of demand thereof being made in writing by the said officer in charge of the Custom-house;

ACT No. IX OF 1878.

(Passed on the 14th March 1878.)

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3. *Power to call upon printer and publisher of newspaper to give bond ;*
4. *And make deposit.*
5. *No bond or deposit to be required when undertaking is given under this section.*
6. *Notice to newspaper offending.*
7. *Service of such notice.*
8. *Liability of plant, copies of paper, and deposit to forfeiture.*
9. *Power to declare deposit forfeited. Power to declare newspapers, plant &c., forfeited, and to seize the same.*
10. *Books, &c., printed in British India and containing matter, or used for purpose described in section 3.*
11. *Copies of newspaper printed elsewhere, and brought into British India, liable to forfeiture in certain cases.*
12. *Power to seize copies of newspaper forfeited under section 11.*
13. *Appeal to the Governor General in Council.*
14. *Power to exclude from British India, newspapers, books, &c., printed out of British India.*
15. *Power of postal authorities to seize newspapers, books, &c.*
16. *Jurisdiction barred.*
17. *Penalty for printing or publishing without executing bond or making deposit.*
18. *Penalty for breach of an undertaking under section 5 or section 8.*
19. *Power to remove territory from operation of Act, and again extend Act.*
20. *Operation of other laws not barred.*

An Act for the better Control of Publications in Oriental languages.

Whereas certain publications in oriental languages printed or circulated in British India have of late contained matter likely to excite disaffection to the Government established by law in British India, or antipathy between persons of different races, castes, religions, or sects in British India, or have been used as means of intimidation or extortion :

And whereas such publications are read by and disseminated amongst large numbers of ignorant and unintelligent persons, and are thus likely to have an influence which they otherwise would not possess ; and whereas it is accordingly necessary for the maintenance of the public tranquillity and for the security of Her Majesty's subjects and others to confer on the Executive Government power to control the printing and circulation of such publications : It is hereby enacted as follows :—

1. This section and sections eleven to sixteen both inclusive apply to the whole of British India ; the other sections of this Act apply only to those parts of British India to which they may from time to time be extended by the Governor General in Council by a notification in the *Gazette of India*.

2. In this Act—

'Newspaper' means any periodical work containing public news, or comments on public news, printed wholly or partially in any oriental language, and includes

two or more copies of a newspaper bearing the same name, whether published on the same day or on different days, and also includes any series of newspapers, whether printed on one day or different days, or with one name, or with different names ; and

‘Print,’ ‘printed’ and ‘printer’ apply not only to printing, but also to lithography, engraving and photography.

3. Any Magistrate of a district or Commissioner of Police in a Presidency town, within the local limits of whose jurisdiction any newspaper is printed or published, may, with the previous sanction of the Local Government and subject to the provisions of section five, call upon the printer and publisher of such newspaper to enter into a joint and several bond, or when the printer and publisher of such newspaper are the same person, call upon such person to enter into a bond, binding themselves or himself, as the case may be, in such sum as the Local Government thinks fit, not to—

(a) print or publish in such newspaper any words, signs, or visible representations, likely to excite disaffection to the Government established by law in British India or antipathy between any persons of different races, castes, religions, or sects in British India ; or

(b) use or attempt to use such newspaper

for the purpose of putting any person in fear or causing annoyance to him and thereby inducing him to deliver to any person any property or valuable security, or anything signed or sealed which may be converted into a valuable security, or to give any gratification to any person, or for the purpose of holding out any threat of injury to a public servant, or to any person in whom they or he believe or believes that public servant to be interested, and thereby inducing that public servant to do any act, connected with the exercise of his public functions.

EXPLANATION.—“Valuable security,” “gratification” and “public servant” are used in this section in the senses in which they are respectively used in the Indian Penal Code.

4. When any bond is executed under section three, the said Magistrate or Commissioner may further require the obligor or obligors of the same to deposit the amount thereof in money or the equivalent thereof in securities of the Government of India ; and the money or securities so deposited shall, subject to the provisions hereinafter contained, remain so deposited until fifteen days after the person or persons depositing the same has or have made and subscribed a declaration under Act No. XXV of 1867, section eight.

When such person or persons has or have subscribed such a declaration, and fifteen days have elapsed from the date of subscribing the same, he or they may apply to the said Magistrate or Commissioner for the restoration of the said money or securities, and thereupon such money or securities shall, subject to the provisions hereinafter contained, be restored to such person or persons.

5. When any publisher or printer is called upon by a Magistrate or Commissioner of Police to execute a bond under this Act in respect of any newspaper, the publisher of such newspaper may deliver to such Magistrate or Commissioner an undertaking in writing to the effect that no words, signs, or visible representations shall, during the year next following the date of such undertaking, be printed or published in such newspaper which have not previously been submitted to such officer as the Local Government may appoint in this behalf, by name or in virtue of his office, or which on being so submitted have been objected to by such officer.

When such undertaking has been so delivered, no such bond or deposit shall be required from the publisher or printer of such newspaper during the said year.

6. Whenever it appears to the Local Government that any newspaper printed or published in the territories under its administration, contains any words, signs, or visible representations of the nature described in section three, clause (a), or that any such newspaper has been used or attempted to be used for any purpose described in the same section, clause (b), such Local Government may cause a notice in the form in the schedule hereto annexed, or to the like effect, to be published in the local official Gazette.

7. A true copy of such notice shall be fixed on some conspicuous part of the premises described in the declaration made in respect of the newspaper under the said Act No. XXV of 1867, section five, and the copy so fixed shall be deemed to have been duly served on the printer and publisher of such paper.

8. If after the publication of such notice and the service thereof, the newspaper in respect of which it has been issued contains any words, signs, or visible representations of the nature described in section three, clause (a), or is used, or attempted to be used, for any purpose described in the same section, clause (b),

all printing presses, engines, machinery, types, lithographic stones, paper, and other implements, utensils, plant, and materials used or employed, or intended to be used or employed, in or for the purpose of printing or publishing such newspaper, or found in or about any premises where such newspaper is printed or published, and

all copies of such newspaper wherever found, and
any money or securities which the printer or publisher of such newspaper may have deposited under the provisions of section three,
shall be liable to be forfeited to Her Majesty.

Provided that the publisher of any newspaper may, on the publication of a notice in respect thereof under section six, and before anything has become liable to forfeiture under this section in respect of such newspaper, deliver to the Magistrate of the District or to the Commissioner of Police in a Presidency town, within the local limits of whose jurisdiction such newspaper is published, an undertaking in writing of the nature specified in section five, and, if such Magistrate or Commissioner accepts such undertaking, nothing shall become liable to forfeiture under this section between the date on which such undertaking is so accepted and the end of the period for which it is given.

9. Whenever it appears to the Local Government that any money or security deposited under this Act in respect of any newspaper is liable to be forfeited under section eight, such Local Government may, by a notification in the local official Gazette, declare such money or security to be forfeited ;

And whenever it appears to the Local Government that any implements, utensils, plant or materials used or employed or intended to be used or employed in or for the purpose of printing or publishing any newspaper, or which is or are in or about any premises where such newspaper is printed or published, or any copies of any newspaper, is or are liable to be forfeited under that section,

the Local Government may declare such implements, utensils, plant, materials or copies to be forfeited and may by warrant issued by its authority under the hand of any Magistrate, empower any person to seize and take away such implements, utensils, plant, materials, and copies wherever found, and to enter upon any premises

(a) where the newspaper specified in such warrant is printed or published, or

(b) where any such implements, utensils, plant, or materials may be or may be reasonably suspected to be, or

(c) where any copy of such newspaper is sold, distributed, published, or publicly exhibited, or reasonably suspected to be sold, distributed, published, or publicly exhibited, or kept for sale, distribution/ publication, or public exhibition, or reasonably suspected to be so kept,

and search for such implements, utensils, plant, materials, and copies.

Every warrant issued under this section, so far as relates to a search, shall be executed in manner provided for the execution of search-warrants under the law relating to criminal procedure for the time being in force.

10. When any book, pamphlet, placard, broad-sheet, or other document printed wholly or partially in any oriental language in British India contains any words, signs, or visible representations which are of the nature described in section three, clause (a),

or when any such book, pamphlet, placard, broadsheet, or other document has been used or attempted to be used for any purpose described in the same section, clause (b),

all printing presses, engines, machinery, types, lithographic stones, paper and other implements, utensils, plant, and materials used or employed in or for the purpose of printing or publishing such book, pamphlet, placard, broadsheet, or other document, or found in or about any premises where the same is printed or published, and all copies of such book, pamphlet, placard, broadsheet or other document, shall be liable to be forfeited to Her Majesty.

Whenever it appears to the Local Government that anything is liable to be forfeited under this section, the Local Government may declare such thing to be forfeited and may direct any Magistrate to issue a warrant in respect of the same, and thereupon such thing may be searched for, seized, and taken away in manner provided by section nine. The Local Government may, upon good cause shown, cancel any forfeiture under this section.

11. When any newspaper printed elsewhere than in British India contains any words, signs, or visible representations of the nature described in section three, clause (a), or is used or attempted to be used for any purpose described in the same section, clause (b), all copies of such newspaper, brought into British India, shall be liable to be forfeited to Her Majesty.

12. Whenever it appears to the Local Government that any copies of any newspaper in any of the territories under its administration are liable to be forfeited under section eleven, such Local Government may declare all copies of such newspaper wherever found to be forfeited, and may by warrant issued by its authority under the hand of any Magistrate, empower any person to seize and take away all copies of such newspaper wherever found, and to enter upon any premises where any copy of such newspaper is sold, distributed, published, or publicly exhibited, or reasonably suspected to be sold, distributed, published, or publicly exhibited, or kept for sale, distribution, publication, or public exhibition, or reasonably suspected to be so kept; and search for all copies of such newspaper.

Every warrant issued under this section shall, so far as relates to a search, be executed in manner provided for the execution of search-warrants under the law relating to criminal procedure for the time being in force.

13. Any person feeling aggrieved by the issue of any notification under section nine or by any declaration made or anything done in the execution of a warrant issued under that section, or under section ten or section twelve, may, within three months from the date of the notification or declaration or the doing of the thing complained of (as the case may be), appeal to the Governor General in Council; and the Governor General in Council shall take such appeal into consideration, and the order passed by him thereon shall be final and conclusive.

14. The Governor General in Council may, by notification in the *Gazette of India*, direct that any newspapers printed at any place beyond the limits of British India, or any books, pamphlets, placards, broadsheets, or other documents printed wholly or partially in any oriental language at any such place, shall not be brought into, or circulated, distributed, or publicly exhibited, or sold, or kept for circulation, distribution, public exhibition, or sale, in British India.

Whoever, in contravention of any direction under this section, brings any such newspaper, book, pamphlet, placard, broadsheet, or other document into British India, or circulates, distributes, publishes, exhibits, or sells the same, or keeps the

same for circulation, distribution, exhibition, or sale, shall be punished with imprisonment for a term which may extend to six months, or with fine, or with both ;

and all copies of such newspaper, book, pamphlet, placard, broadsheet, or other document found in British India shall be forfeited to Her Majesty.

Whenever it appears to any Magistrate of a district or to any Commissioner of Police in a Presidency town that anything within the local limits of his jurisdiction is forfeited under this section, he may issue a warrant to search for and seize the same, and such warrant shall be executed in manner provided for the execution of search-warrants under the law relating to criminal procedure for the time being in force.

15. When any declaration has been made under section nine, section ten, or section twelve, in respect of any newspaper, book, pamphlet, placard, broadsheet, or other document, or any notification has been issued in respect of the same under section fourteen, any officer of the Postal Department empowered in this behalf by the Governor General in Council, by name or in virtue of his office, may search or cause search to be made for any copies of the same in the custody of that Department, and shall deliver all such copies found to such officer as the Governor General in Council may appoint in this behalf by name or in virtue of his office.

16. Every notification and declaration of forfeiture purporting to be issued or made under this Act shall, as against all persons, be conclusive evidence that the forfeiture therein referred to has taken place ; and no proceeding purporting to be taken under this Act, or in execution of a warrant issued under this Act, shall be called in question by any Court of civil or criminal jurisdiction ; and no Civil or Criminal proceeding shall be instituted against any person for anything purporting to be done under this Act or in execution of any such warrant, or for the recovery of any property purporting to be seized under this Act.

17. Any publisher or printer of a newspaper required to execute a bond or make a deposit under section three or section four, and publishing or printing such newspaper without having complied with such requisition, shall be punished with imprisonment for a term which may extend to six months, or with fine, or with both.

18. When any publisher of a newspaper has given an undertaking under section five or section eight, and during the period for which such undertaking is given, any words, signs, or visible representations which have not been submitted to the officer appointed under section five, or which on being so submitted have been objected to by him, are printed or published in such newspaper, such publisher and the printer of such newspaper, shall be punished with imprisonment for a term which may extend to six months, or with fine, or with both.

19. Any portion of this Act which has been extended to any part of British India under section one shall cease to be in force in such part whenever the Governor General in Council, by notification in the *Gazette of India*, so directs, but may be again extended to such part by a like notification.

20. Nothing herein contained shall be deemed to prevent any person from being prosecuted under any other law for any act or omission which constitutes an offence against this Act.

SCHEDULE.

FORM OF NOTICE UNDER SECTION 6.

WHERAS a certain newspaper (*state name of newspaper*) contains words, signs, or visible representations (*as the case may be*) of the nature described in section 3. clause (a), of Act No. IX of 1878 [*or is used for a purpose mentioned in section 3 of Act No. IX of 1878, clause (b), or Whereas an attempt has been made to use a certain newspaper (state name of newspaper) for a purpose, &c.*]

This is to give notice to all whom it may concern, and to give all such persons warning according to the provisions of section 6 of the said Act No. IX of 1878.

This day of

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A. B.

Secretary to {the Government of
the Chief Commissioner of

ACT No. XI OF 1878.

*The Indian Arms Act, 1878.**(Passed on the 15th March 1878.)*

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SCHEDULES.

An Act to consolidate and amend the law relating to Arms, Ammunition and Military Stores.

WHEREAS it is expedient to consolidate and amend the law relating to arms, ammunition and military stores; It is hereby enacted as follows:—

I.—Preliminary.

1. This Act may be called “The Indian Arms Act, 1873,” and it extends to the whole of British India.

But nothing herein contained shall apply to—

(a) arms, ammunition or military stores on board any sea-going vessel and forming part of her ordinary armament or equipment, or

(b) the manufacture, conversion, sale, import, export, transport, bearing or possession of arms, ammunition or military stores by order of the Government, or by a public servant or a volunteer enrolled under the Indian Volunteers Act, 1869, in the course of his duty as such public servant or volunteer.

2. This Act shall come into force on such day as the Governor-General in Council by notification in the *Gazette of India* appoints.

3. On and from that day enactments mentioned in the first schedule hereto annexed shall be repealed to the extent specified in the third column of the said schedule. But all authorities and permissions given, licenses and exemptions granted, orders and appointments made, notifications published, and rules, conditions, and forms prescribed under any enactment hereby repealed shall be deemed to be respectively given, granted, made, published and prescribed under this Act.

And all such authorities, permissions, licences and exemptions shall, except as otherwise provided by this Act, continue in force for the periods for which they may have been given or granted respectively, or, where no such period is expressly fixed, for one year from the date on which this Act comes into force, and shall then cease to have effect.

4. In this Act unless there be something repugnant in the subject or context—

“Cannon” includes also all howitzers, mortars, wall pieces, mitrailleuses and other ordnance and machine-guns, all parts of the same, and all carriages, platforms and appliances for mounting, transporting and serving the same:

“Arms” includes fire-arms, bayonets, swords, daggers, spears, spear-heads and bows and arrows, also cannon and parts of arms, and machinery for manufacturing arms:

“Ammunition” includes also all articles specially designed for torpedo service and submarine mining, rockets, gun-cotton, dynamite, lithofracteur and other explosive or fulminating material, gun-flints, gun-wads, percussion caps, fuses, and friction tubes, all parts of ammunition and all machinery for manufacturing ammunition, but does not include lead, sulphur or saltpetre:

“Military stores” in any section of this Act, as applied to any part of British India means any military stores to which the Governor General in Council may from time to time by notification in the *Gazette of India* specially extend such section in such part, and includes also all lead, sulphur, saltpetre and other material to which the Governor General in Council may from time to time so extend such section.

“License” means a license granted under this Act, and “licensed” means holding such license:

II.—Manufacture, Conversion and Sale.

5. No person shall manufacture, convert, or sell, or keep, offer or expose for sale, any arms, ammunition or military stores except under a license and in the manner and to the extent permitted thereby.

Nothing herein contained shall prevent any person from selling any arms or ammunition which he lawfully possesses for his own private use to any person who is not by any enactment for the time being in force prohibited from possessing the same; but every person so selling arms or ammunition to any person other than a person entitled to possess the same by reason of an exemption under section twenty-seven of this Act shall, without unnecessary delay, give to the Magistrate of the district or to the officer in charge of the nearest police-station notice of the sale and of the purchaser's name and address.

III.—Import, Export and Transport.

6. No person shall bring or take by sea or by land into or out of British India any arms, ammunition or military stores except under a license and in the manner and to the extent permitted by such license.

Nothing in the first clause of this section extends to arms (other than cannon) or ammunition imported or exported in reasonable quantities for his own private use by any person lawfully entitled to possess such arms or ammunition; but the Collector of Customs or any other officer empowered by the Local Government in this behalf by name or in virtue of his office may at any time detain such arms or ammunition until he receives the orders of the Local Government thereon.

Explanation.—Arms, ammunition and military stores taken from one part of British India to another by sea or across intervening territory not being part of British India are taken out of and brought into British India within the meaning of this section.

7. Notwithstanding anything contained in the Sea-Customs Act, 1878, no arms, ammunition or military stores shall be deposited in any warehouse licensed under section 16 of that Act without the sanction of the Local Government.

8. In lieu of the duties imposed by the Indian Tariff Act, 1875, upon the articles mentioned in the second schedule hereto annexed when imported by sea, there shall be levied and collected, in every part of British India, upon the same articles the duties specified in the same schedule:

Provided that no duty in excess of ten per cent. *ad valorem* shall be levied upon any of the said articles imported in reasonable quantity for his own private use by any person lawfully entitled to possess the same:

Provided also that when any articles which have been otherwise imported and upon which duty has been levied or is leviable under this section are purchased retail from the importer by a person lawfully entitled as aforesaid, in reasonable quantity for his own private use, the importer may apply to the Customs-collector for a refund or remission (as the case may be) of so much of the duty thereon as is in excess of ten per cent. *ad valorem*; and if such collector is satisfied as to the identity of the articles, and that such importer is in other respects entitled to such refund or remission, he shall grant the same accordingly.

9. The Governor General in Council may from time to time by notification in the *Gazette of India* direct that duties not exceeding those specified in the second schedule hereto annexed shall be levied upon any articles mentioned in that schedule and brought by land into any part of British India, and may in like manner cancel any such notification.

10. The Governor General in Council may from time to time by notification in the *Gazette of India*—

(a) regulate or prohibit the transport of any description of arms, ammunition or military stores over the whole of British India or any part thereof, either altogether or except under a license and to the extent and in the manner permitted by such license, and

(b) cancel any such notification.

Explanation.—Arms, ammunition or military stores transhipped at a port in British India are transported within the meaning of this section.

11. The Local Government with the previous sanction of the Governor General in Council may, at any places along the boundary line between British India and Foreign territory and at such distance within such line as it deems expedient, establish searching posts at which all vessels, carts and baggage animals, and all boxes, bales and packages in transit may be stopped and searched for arms, ammunition and military stores by any officer empowered by such Government in this behalf by name or in virtue of his office.

12. When any person is found carrying or conveying any arms, ammunition or military stores, whether covered by a license or not, in such manner or under such circumstances as to afford just grounds of suspicion that the same are being carried by him with intent to use them, or that the same may be used, for any unlawful purpose, any person may without warrant apprehend him and take such arms, ammunition or military stores from him.

Any person so apprehended and any arms, ammunition or military stores so taken by a person not being a Magistrate or Police-officer shall be delivered over as soon as possible to a Police-officer.

All persons apprehended by, or delivered to, a Police-officer and all arms and ammunition seized by or delivered to any such officer under this section shall be taken without unnecessary delay before a Magistrate.

IV.—Going armed and possessing Arms, &c.

13. No person shall go armed with any arms except under a license and to the extent and in the manner permitted thereby.

Any person so going armed without a license or in contravention of its provisions may be disarmed by any Magistrate, Police-officer or other person empowered by the Local Government in this behalf by name or by virtue of his office.

14. No person shall have in his possession or under his control any cannon or fire-arms, or any ammunition or military stores except under a license and in the manner and to the extent permitted thereby.

During the three months next following the date on which this Act comes into force nothing in the former part of this section shall apply to the possession by any person of any fire-arms, ammunition or military stores in any place to which section 32, clause 2, of Act No. XXXI of 1860 does not apply at such date.

Any person having within the said period of three months any fire-arms, ammunition or military stores in his possession in any such place may, and any person having at the expiry of the same period any fire-arms, ammunition or military stores in his possession in any such place without a license shall, deposit the same with the officer in charge of the nearest police-station.

If the owner of any thing deposited under this section does not within the year next following the date on which this Act comes into force, obtain a licence authorizing him to possess such thing and apply for delivery of the same, such thing shall be forfeited to Her Majesty.

15. In any place to which section 32, clause 2 of Act No. XXXI of 1860, applies at the time this Act comes into force or to which the Local Government, with the previous sanction of the Governor General in Council, may by notification in the local official Gazette specially extend this section, no person shall have in his possession any arms of any description except under a license and in the manner and to the extent permitted thereby.

16. Any person possessing arms, ammunition or military stores, the possession whereof by him has, in consequence of the cancellation or expiry of a license or by the issue of a notification under section fifteen become unlawful, shall deposit the same without unnecessary delay with the officer in charge of the nearest police-station.

If the owner of any thing deposited under this section does not within three years from the date on which such thing is so deposited produce a license authorising him to possess the same and apply for delivery of the same, such thing shall be forfeited to Her Majesty.

V.—*Licenses.*

17. The Governor General in Council may from time to time, by notification in the *Gazette of India*, make rules to determine the officers by whom, the form in which, and the terms and conditions on and subject to which, any license shall be granted; and may by such rules among other matters—

(a) fix the period for which such license shall continue in force;

(b) fix a fee payable by stamp or otherwise in respect of any such license granted in a place to which section 32, clause 2, of Act No. XXXI of 1860 applies at the time this Act comes into force, or in respect of any such license other than a license for possession granted in any other place;

(c) direct that the holder of any such license other than a license for possession shall keep a record or account in such form as the Local Government may prescribe of anything done under such license, and exhibit such record or account when called upon by an officer of Government to do so;

(d) empower any officer of Government to enter and inspect any premises in which arms, ammunition or military stores are manufactured or kept by any person holding a license of the description referred to in section five or section six;

(e) direct that any such person shall exhibit the entire stock of arms, ammunition and military stores in his possession or under his control to any officer of Government so empowered, and

(f) require the person holding any license or acting under any license to produce the same, and to produce or account for the arms, ammunition or military stores covered by the same when called upon by an officer of Government so to do.

18. Any license may be cancelled or suspended—

(a) by the officer by whom the same was granted, or by any authority to which he may be subordinate, or by any Magistrate of a district or commissioner of police in a presidency town, within the local limits of whose jurisdiction the holder of such license may be, when, for reasons to be recorded in writing, such officer, authority, Magistrate or commissioner deems it necessary for the security of the public peace to cancel or suspend such license; or

(b) by any Judge or Magistrate before whom the holder of such license is convicted of an offence against this Act, or against the rules made under this Act; and

the Local Government may at its discretion by a notification in the local official Gazette cancel or suspend all or any licenses throughout the whole or any portion of the territories under its administration.

VI.—*Penalties.*

19. Whoever commits any of the following offences (namely)—

(a) manufactures, converts or sells, or keeps, offers or exposes for sale any arms, ammunition or military stores in contravention of the provisions of section five;

(b) fails to give notice as required by the same section;

(c) imports or exports any arms, ammunition or military stores in contravention of the provisions of section six;

(d) transports any arms, ammunition or military stores in contravention of a regulation or prohibition issued under section ten;

(e) goes armed in contravention of the provisions of section thirteen ;

(f) has in his possession or under his control any arms, ammunition or military stores in contravention of the provisions of section fourteen or section fifteen ;

(g) intentionally makes any false entry in a record or account which by a rule made under section seventeen, clause (c), he is required to keep ;

(h) intentionally fails to exhibit anything which by a rule made under section seventeen, clause (e), he is required to exhibit ; or

(i) fails to deposit arms, ammunition or military stores, as required by section fourteen or section sixteen ;

shall be punished with imprisonment for a term which may extend to three years, or with fine, or with both.

20. Whoever does any act mentioned in clause (a), (c), (d) or (f) of section nineteen, in such manner as to indicate an intention that such act may not be known to any public servant as defined in the Indian Penal Code, or to any person employed upon a Railway or to the servant of any public carrier,

and whoever, on any search being made under section twenty-five, conceals or attempts to conceal any arms, ammunition or military stores,

shall be punished with imprisonment for a term which may extend to seven years, or with fine, or with both.

21. Whoever, in violation of a condition subject to which a license has been granted, does or omits to do any act shall, when the doing or omitting to do such act is not punishable under section nineteen or section twenty, be punished with imprisonment for a term which may extend to six months, or with fine which may extend to five hundred rupees, or with both.

22. Whoever knowingly purchases any arms, ammunition or military stores from any person not licensed or authorized under the proviso to section five to sell the same ; or delivers any arms, ammunition or military stores into the possession of any person without previously ascertaining that such person is legally authorized to possess the same,

shall be punished with imprisonment for a term which may extend to six months, or with fine which may extend to five hundred rupees, or with both.

23. Any person violating any rule made under this Act, and for the violation of which no penalty is provided by this Act, shall be punished with imprisonment for a term which may extend to one month, or with fine which may extend to two hundred rupees, or with both.

24. When any person is convicted of an offence punishable under this Act committed by him in respect of any arms, ammunition or military stores, it shall be in the discretion of the convicting Court or Magistrate further to direct that the whole or any portion of such arms, ammunition or military stores, and any vessel, cart, or baggage animal used to convey the same, and any box, package or bale in which the same may have been concealed, together with the other contents of such box, package or bale, shall be confiscated.

VII.—Miscellaneous.

25. Whenever any Magistrate has reason to believe that any person residing within the local limits of his jurisdiction has in his possession any arms, ammunition or military stores for any unlawful purpose,

or that such person cannot be left in the possession of any such arms, ammunition or military stores without danger to the public peace,

such Magistrate, having first recorded the grounds of his belief, may cause a search to be made of the house or premises occupied by such person, or in which such Magistrate has reason to believe such arms, ammunition or military stores are or is to be found, and may seize and detain the same, although covered by a license, in safe custody for such time as he thinks necessary.

The search in such case shall be conducted by, or in the presence of, a Magistrate, or by or in the presence of some officer specially empowered in this behalf by name or in virtue of his office by the Local Government.

26. The Local Government may at any time order or cause to be seized any arms, ammunition or military stores in the possession of any person, notwithstanding that such person is licensed to possess the same, and may detain the same for such time as it thinks necessary for the public safety.

27. The Governor General in Council may from time to time by notification published in the *Gazette of India*—

(a) exempt any person by name or in virtue of his office or any class of persons or exclude any description of arms or ammunition or withdraw any part of British India, from the operation of any prohibition or direction contained in this Act; and

(b) cancel any such notification and again subject the persons or things or the part of British India comprised therein to the operation of such prohibition or direction.

28. Every person aware of the commission of any offence punishable under this Act, shall in the absence of reasonable excuse, the burden of proving which shall lie upon such person, give information of the same to the nearest Police-officer or Magistrate, and

every person employed upon any railway or by any public carrier shall, in the absence of reasonable excuse, the burden of proving which shall lie upon such person, give information to the Police-officer regarding any box, package or bale in transit which he may have reason to suspect contains arms, ammunition or military stores in respect of which an offence against this Act has been or is being committed.

29. Where an offence punishable under section nineteen, clause (f), has been committed within three months from the date on which this Act comes into force in any province, district or place to which section 32, clause 2 of Act XXXI of 1860 applies at such date, or where such an offence has been committed in any part of British India not being such a district, province or place, no proceedings shall be instituted against any person in respect of such offence without the previous sanction of the Magistrate of the district or in a presidency town of the commissioner of police.

✓ 30. Where a search is to be made under the Code of Criminal Procedure or the Presidency Magistrates Act 1877 in the course of any proceedings instituted in respect of an offence punishable under section nineteen, clause (f), such search shall, notwithstanding anything contained in the said Code or Act, be made in the presence of some officer specially appointed by name or in virtue of his office by the Local Government in this behalf, and not otherwise.

31. Nothing in this Act shall be deemed to prevent any person from being prosecuted under any other law for any act or omission which constitutes an offence against this Act or the rules made under it, or from being liable under such other law to any higher punishment or penalty than that provided by this Act: Provided that no person shall be punished twice for the same offence.

32. The Local Government may from time to time by notification in the local official Gazette direct a census to be taken of all fire-arms in any local area, and empower any person by name or in virtue of his office to take such census.

On the issue of any such notification, all persons possessing any such arms in such area shall furnish to the person so empowered such information as he may require in reference thereto, and shall produce such arms to him if he so requires.

Any person refusing or neglecting to produce any such arms when so required, shall be punished with imprisonment for a term which may extend to one month, or with fine which may extend to two hundred rupees, or with both.

33. No proceeding other than a suit shall be commenced against any person for any thing done in pursuance of this Act, without having given him at least one month's previous notice in writing of the intended proceeding and of the cause thereof, nor after the expiration of three months from the accrual of such cause.

THE FIRST SCHEDULE.

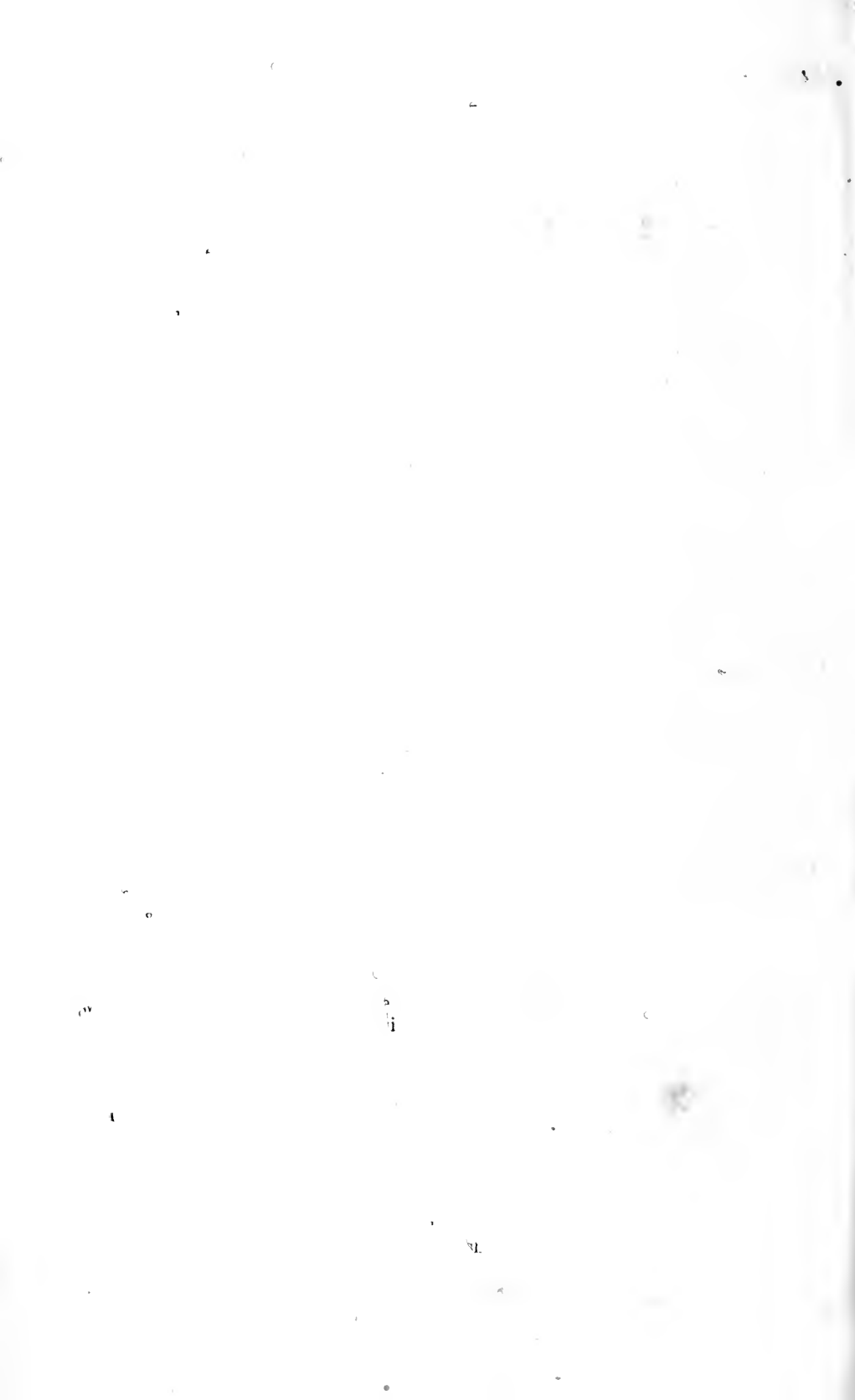
Number and year.	Title.	Extent of repeal.
XVIII of 1841	An Act for consolidating and amending the enactments concerning the exportation of Military Stores.	So much as has not been repealed.
XXX of 1854	An Act to provide for the levy of Duties of Customs in the Arracan, Pegu, Martaban and Tenasserim Provinces.	In the preamble the words "and that the exportation of munitions of war from any of these Provinces into foreign States should be prohibited."
XXXI of 1860	An Act relating to the manufacture, importation and sale of Arms and Ammunition, and for regulating the right to keep and use the same, and to give power of disarming in certain cases.	Section 11. So much as has not been repealed.
VI of 1866	An Act to continue Act No. XXXI of 1860 (relating to the manufacture, importation and sale of Arms and Ammunition, and for regulating the right to keep and use the same, and to give power of disarming in certain cases), and for other purposes.	The whole.
II of 1872	The Santhal Parganas Settlement Regulation.	So much of the schedule as relates to Act XXXI of 1860 and Act VI of 1866.
IX of 1874	The Arakan Hills District Laws Regulation, 1874.	So much of the schedule as relates to Act XVIII of 1841.
XV of 1874	An Act for declaring the local extent of certain Enactments, and for other purposes.	So much of the first schedule as relates to Act XVIII of 1841.

THE SECOND SCHEDULE.

(See Section 8.)

	Rs.	A.	P.
(1) Fire-arms other than pistols, for each	50	0	0
(2) Barrels for the same, whether single or double, for each	30	0	0
(3) Pistols, for each	15	0	0
(4) Barrels for the same, whether single or double, for each	10	0	0
(5) Springs used for fire-arms, for each	8	0	0
(6) Gun-stocks, sights, blocks and rollers, for each	6	0	0
(7) Revolver-breeches, for each cartridge which they will carry	2	8	0
(8) Extractors, nippers, heel-plates, pins, screws, tangs, bolts, thumb-pieces, triggers, trigger-guards, hammers, pistons, plates, and all other parts of a fire-arm not herein otherwise provided for, and all tools used for cleaning or putting together or loading the same, for each	1	8	0
(9) Machines for making or loading or closing cartridges, for each	10	0	0
(10) Machines for capping cartridges, for each	2	8	0

Exception.—Articles falling under the 5th, 6th, 8th, 9th or 10th head of this schedule when they appertain to a fire-arm falling under the 1st or 3rd head and are fitted into the same case with such fire-arm.



ACT No. XII OF 1878.

(Passed on the 28th March 1878.)

1. *Substitution of new section for Act IV of 1872, s. 5.*
2. *Substitution of new sections for Act IV of 1872, ss. 9 to 18.*
3. *Substitution of new section for Act IV of 1872, s. 35.*
4. *Amendment of Act IV of 1872, section 38.*
5. *Amendment of Act IV of 1872, section 40.*
6. *Amendment of Act IV of 1872, sections 43, 44 and 47.*
7. *Penalty for breach of rules under Act IV of 1872.*
8. *Recovery of advances made by Government.*

An Act for the further amendment of the Panjab Laws Act, 1872.

For the purpose of further amending the Panjab Laws Act, 1872 ; It is hereby enacted as follows :—

1. For section 5 of the said Act, the following shall be substituted (namely):—

“ 5. In questions regarding succession, special property of females, betrothal, marriage, divorce, dower, adoption, guardianship, minority, bastardy, family-relations, wills, legacies, gifts, partitions, or any religious usage or institution, the rule of decision shall be—

“ (a) any custom applicable to the parties concerned, which is not contrary to justice, equity or good conscience, and has not been, by this or any other enactment, altered or abolished, and has not been declared to be void by any competent authority ;

“ (b) the Muhammadan law, in cases where the parties are Muhammadans, and the Hindu law, in cases where the parties are Hindus, except in so far as such law has been altered or abolished by legislative enactment, or is opposed to the provisions of this Act, or has been modified by any such custom as is above referred to.”

2. For sections 9 to 18 (both inclusive) of the same Act, the following shall be substituted :—

“ 9. The right of pre-emption is a right of the persons hereinafter mentioned or referred to, to acquire, in the cases hereinafter specified, immoveable property in preference to all other persons. It arises in respect of sales (whether under a decree or otherwise) of immoveable property and of foreclosures of rights to redeem such property.

“ 10. Unless the existence of any custom or contract to the contrary is proved, such right shall, whether recorded in the settlement-record or not, be presumed—

“ (a) to exist in all village-communities, however constituted, and

“ (b) to extend to the village-site, to the houses built upon it, to all lands and shares of lands within the village-boundary, and to all transferable rights of occupancy affecting such lands.

“ 11. The right of pre-emption shall not be presumed to exist in any town or city, or any sub-division thereof, but may be shown to exist therein, and to be exercisable therein by such persons and under such circumstances as the local custom prescribes.

“ 12. If the property to be sold or the right to redeem which is to be foreclosed is situate within, or is a share of, a village, the right to buy or redeem such property belongs, in the absence of a custom to the contrary,—

“ (a) first, in the case of joint undivided immoveable property, to the co-sharers ;

“ (b) secondly, in the case of villages held on ancestral shares, to co-sharers in the village, in order of their relationship to the vendor or mortgagor ;

“(c) thirdly, if no co-sharer or relation of the vendor or mortgagor claims to exercise such right, to the landowners of the patti or other sub-division of the village in which the property is situate, jointly;

“(d) fourthly, if the landowners of the patti or other sub-division make no joint claim to exercise such right, to such landholders severally;

“(e) fifthly, to any landholder of the village;

“(f) sixthly, to the tenants (if any) with rights of occupancy in the property;

“(g) seventhly, to the tenants (if any) with rights of occupancy in the village:

“Provided that when the property is land to the trees standing on which the Government is entitled, such right belongs to the Lieutenant-Governor of the Panjab in preference to all other persons.

“Where two or more persons are equally entitled to such right, the vendor or mortgagor may determine which of them shall exercise the same.

“Nothing in the former part of this section shall be deemed to affect the Panjab Tenancy Act, 1868, section 34; but if a landlord refuse or neglect to exercise the right conferred on him by that section, such right belongs, first, to the tenants (if any) with rights of occupancy in the property concerned, and secondly, to the tenants (if any) with right of occupancy in the village in which such property is situate.

“13. When any person proposes to sell any property, or to foreclose the right to redeem any property, in respect of which any persons have a right of pre-emption, he shall give notice to the persons concerned of the price at which he is willing to sell such property, or of the amount due in respect of the mortgage, as the case may be.

“Such notice shall be given through any Court within the local limits of whose jurisdiction the property or any part thereof is situate, and shall be deemed sufficiently given if it be stuck up on the chaupal or other public place of the village, town or city in which the property is situate.

“14. Any person having a right of pre-emption in respect of any property proposed to be sold, shall lose such right, unless within three months from the date of giving such notice he pays or tenders to the person so proposing to sell the price aforesaid or the fair market-value of the property, or deposits the same in the Court from which the notice issued. When any money is so deposited the Court shall give notice of such deposit to the vendor or mortgagor as the case may be.

“15. When the right of pre-emption arises in respect of the foreclosure of the right to redeem any property, any person entitled to such right may, at any time within three months after the giving of the notice required by section thirteen, pay or tender to the mortgagee or his successor in title the amount specified in such notice, or the amount really due on the footing of the mortgage, and shall thereupon acquire a right to purchase the property.

“On completion of the purchase the person exercising the right of pre-emption shall be bound to pay to the mortgagee or his successor in title the amount specified in such notice, together with interest on the principal sum secured by the mortgage, at the rate specified by the instrument of mortgage, for any time which has elapsed since the date of the notice, and any additional costs which may have been properly incurred by the mortgagee or his successor in title.

“16. Any person entitled to a right of pre-emption may bring a suit to enforce such right on any of the following grounds (namely):—

“(a) that no due notice was given as required by section thirteen;

“(b) that tender was made under section fourteen or section fifteen and refused ;

“(c) in the case of a sale, that the price stated in the notice was not fixed in good faith ;

“(d) in the case of a foreclosure, that the amount claimed by the mortgagee was not really due on the footing of the mortgage, or was not claimed in good faith, or that it exceeds the fair market-value of the property mortgaged.

“If, in the case of a sale, the Court finds that the price was not fixed in good faith, the Court shall fix such price as appears to it to be the fair market-value of the property sold.

“If, in the case of a foreclosure, the Court finds that the amount claimed by the mortgagee was not really due on the footing of the mortgage, or that it was not claimed in good faith, or that it exceeds the fair market-value of the property mortgaged, the amount to be paid to the mortgagee shall not exceed what the Court finds to be such market-value.

“16A. When any suit is instituted under section sixteen, the Court may in its discretion require the plaintiff to pay into Court the price or market-value of the property, or, in the case of a right to redeem property, the amount really due on the footing of the mortgage, and if such requisition is not complied with in such time as the Court directs, may reject the plaint.

“17. If the Court find for the plaintiff, the decree shall specify a day not being a holiday on or before which the purchase-money or the amount to be paid to the mortgagee shall be paid.

“18. If such purchase-money or amount is not paid into Court before it rises on that day, the decree shall become void, and the plaintiff shall, so far only as relates to such sale or foreclosure, lose his right of pre-emption over the property to which the decree relates.”

3. For section 35 of the same Act the following shall be substituted (namely) :—

“35. The Court of Wards may, at its discretion, take charge of, and administer, the estates of all disqualified persons, that is to say :—

“(a) females deemed by the Local Government incompetent to manage their estates ;

“(b) persons who have not completed the age of eighteen years ;

“(c) idiots ;

“(d) lunatics ;

“(e) persons declared by the Local Government incapable, owing to physical defects or infirmities, of managing their own estates ;

“(f) persons convicted of a non-bailable offence and unfitted, in the opinion of the Local Government by vice or bad character to manage their estates ;

“(g) persons declared by the Local Government, on their own application, to be unfitted to manage their estates :

“Provided that the Court of Wards shall not take charge of, or administer, the estate of any person of any of the classes mentioned in clauses (a), (b), (c) and (d) of this section, unless he has inherited a beneficial interest in an estate for which a settlement was made with his ancestor, or in respect of which he would have been entitled to be settled with, if he had been competent to make an agreement for the payment of revenue, or unless he is the holder by inheritance of an assignment of land-revenue :

“ Provided also that the Court of Wards shall not take charge of, or administer any beneficial interest in, an estate in which more persons than one have a joint undivided interest, unless all such persons are so circumstanced as to be subject to the Court of Wards.”

4. To section 38 of the same Act the following clause shall be added (namely) :—

“ Persons whose property is under the superintendence of the Court of Wards shall not be competent to create, without the sanction of the Court, any charge upon, or interest in, such property or any part thereof.”

5. To section 40 of the same Act shall be added the words ‘ and may withdraw any powers so conferred.’

6. In sections 43, 44 and 47 of the same Act the words ‘ with the consent and ’ shall be omitted.

7. Whoever breaks any rule made by the Local Government under the same Act shall be punished with imprisonment for a term which may extend to six months, or with fine which may extend to fifty rupees, or with both. All penalties inflicted since the fifteenth day of July 1875 which might have been inflicted if this section had been in force shall be deemed to have been inflicted in accordance with law.

8. To the same Act the following section shall be added :—

“ 52. All advances made by the Local Government to landholders for the relief of distress, the purchase of seed and cattle, the construction, maintenance and repair of dwelling-houses and other buildings, and for other purposes not specified in the Land Improvement Act, 1871, shall, when they become due, be recoverable from the person to whom the advance was made, or from any person who has become surety for the repayment thereof, as if they were arrears of land-revenue due by the person to whom the advance was made or by his surety.”

ACT No. XVI OF 1878.

(Passed on the 16th October 1878.)

An Act to amend Act No. IX of 1878 (for the better control of Publications in Oriental languages).

Whereas by Act No. IX of 1878 (*for the better control of Publications in Oriental languages*), section five, it is enacted that when any publisher or printer is called upon by a Magistrate or Commissioner of Police to execute a bond under that Act in respect of any newspaper, the publisher of such newspaper may deliver to such Magistrate or Commissioner an undertaking in writing to the effect that no words, signs or visible representations shall, during the year next following the date of such undertaking, be printed or published in such newspaper which have not previously been submitted to such officer as the Local Government may appoint in this behalf, by name or in virtue of his office, or which on being so submitted have been objected to by such officer, and that when such undertaking has been so delivered, no such bond and no such deposit as is mentioned in section four of the said Act shall be required from the publisher or printer of such newspaper during the said year ;

And whereas by the last paragraph of section eight of the same Act it is provided that the publisher of any newspaper may, on the publication of a notice in respect thereof under section six of the said Act, and before anything has become liable to forfeiture under the said section eight in respect of such newspaper, deliver to the Magistrate of the District, or to the Commissioner of Police in a Presidency-town, within the local limits of whose jurisdiction such newspaper is published, an undertaking as aforesaid, and, if such Magistrate or Commissioner accepts such undertaking, nothing shall become liable to forfeiture as aforesaid between the date on which such undertaking is so accepted and the end of the period for which it is given ;

And whereas by the same Act, section eighteen, it is enacted that when any publisher of a newspaper has given any undertaking as aforesaid, and during the period for which such undertaking is given, any words, signs or visible representations which have not been submitted to the officer appointed as aforesaid, or which on being so submitted have been objected to by him, are printed or published in such newspaper, such publisher and the printer of such newspaper shall be punished with imprisonment for a term which may extend to six months, or with fine, or with both ;

And whereas it is expedient to repeal the enactments and proviso hereinbefore cited and the reference in section three of the said Act to the said section five ; it is hereby enacted as follows :—

1. The following portions of the said Act are repealed (that is to say): sections five and eighteen, the last paragraph of section eight, and in section three, the words “and subject to the provisions of section five.”

ACT No. XVII OF 1878.

*The Northern India Ferries Act, 1878.**(Passed on the 9th November 1878.)*

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An Act to regulate Ferries in Northern India.

Whereas it is expedient to regulate ferries in the Punjab, the North-Western Provinces, Oudh, the Central Provinces, Assam and Ajmer and Merwára; It is hereby enacted as follows :—

I.—PRELIMINARY.

1. This Act may be called “The Northern India Ferries Act, 1878.”

It extends only to the territories respectively administered by the Lieutenant Governors of the Punjab and the North-Western Provinces and the Chief Commissioners of Oudh, the Central Provinces, Assam and Ajmer and Merwára :

It shall come into force in each of the said territories on such date as the Local Government may by notification in the official Gazette fix in this behalf.

2. On and from the date on which it comes into force in the territories respectively administered by the Lieutenant-Governor of the North-Western Provinces and the said Chief Commissioners, Bengal Regulation VI of 1819 shall be repealed therein ; but all determinations, declarations, orders and rules made, engagements entered into, and securities taken under that Regulation, and then in force, shall be deemed to be respectively made, entered into and taken under this Act.

3. In this Act the word “ferry” includes also a bridge of boats, pontoons or rafts, a swing-bridge, a flying-bridge and a temporary bridge, and the approaches to, and landing-places of, a ferry.

II.—PUBLIC FERRIES.

4. The Local Government may, from time to time,—

- (a) declare what ferries shall be deemed public ferries, and the respective districts in which, for the purposes of this Act, they shall be deemed to be situate ;
- (o) take possession of a private ferry and declare it to be a public ferry ;
- (c) establish new public ferries where, in its opinion, they are needed ;
- (d) define the limits of any public ferry ;
- (e) change the course of any public ferry ; and
- (f) discontinue any public ferry which it deems unnecessary.

Every such declaration, establishment, definition, change or discontinuance shall be made by notification in the official Gazette :

Provided that, when a river lies between two Provinces, the powers conferred by this section shall, in respect of such river, be exercised by the Governor General in Council, by notification in the *Gazette of India*, and not otherwise :

Provided also that, when any alteration in the course or in the limits of a public ferry is rendered necessary by changes in the river, such alteration may be made, by an order under his hand, by the Commissioner of the Division in which such ferry is situate, or by such other officer as the Local Government may, from time to time, appoint by name or in virtue of his office in this behalf.

5. Claims for compensation for any loss sustained by any person in consequence of a private ferry being taken possession of under section four, shall be enquired into by the Magistrate of the District in which such ferry is situate, or

such officer as he appoints in this behalf, and submitted for the consideration and orders of the Local Government.

6. The immediate superintendence of every public ferry shall, except as provided in section seven, be vested in the Magistrate of the District in which such ferry is situate, or in such other officer as the Local Government may, from time to time, appoint by name or in virtue of his office in this behalf ;

and such Magistrate or officer shall, except when the tolls at such ferry are leased, make all necessary arrangements for the supply of boats for such ferry, and for the collection of the authorized tolls leviable thereat.

7. The Local Government may direct that any public ferry situate within the limits of a town be managed by the officer or public body charged with the superintendence of the municipal arrangements of such town ;

and may further direct that all or any part of the proceeds from such ferry be paid into the Municipal Fund of such town ;

and thereupon such ferry shall be managed, and such proceeds or part thereof shall be paid, accordingly.

8. The tolls of any public ferry may, from time to time, be let by public auction for such term not exceeding five years as the Magistrate of the District, subject to the approval of the Commissioner of the Division in which such ferry is situate, may deem expedient.

The lessee shall conform to the rules made under this Act for the management and control of such ferry, and may be called upon by the officer conducting the auction to give such security for his good conduct and for the punctual payment of the rent as such officer thinks fit.

Such officer may, for sufficient reason recorded in writing under his hand, refuse to accept the offer of the highest bidder, and may accept any other bid, or may withdraw the tolls from auction.

9. All arrears due by the lessee of the tolls of a public ferry on account of his lease may be recovered from the lessee or his surety (if any) by the Magistrate of the District in which such ferry is situate as if they were arrears of land-revenue.

10. The Local Government may cancel the lease of the tolls of any public ferry on the expiration of six months' notice in writing to the lessee of its intention to cancel such lease.

When any lease is cancelled under this section, the Magistrate of the District in which such ferry is situate shall pay to the lessee such compensation as such Magistrate may, with the previous sanction of the Local Government, award.

11. The lessee of the tolls of a public ferry may surrender his lease on the expiration of one month's notice in writing to the Local Government of his intention to surrender such lease, and on payment to the Magistrate of the District in which such ferry is situate of such compensation as such Magistrate, subject to the approval of the Commissioner, may in each case direct.

12. Subject to the control of the Local Government, the Commissioner of a Division, or such other officer as the Local Government may, from time to time, appoint in this behalf, by name or in virtue of his office, may, from time to time, make rules consistent with this Act—

(a) for the control and the management of all public ferries within such Division and for regulating the traffic at such ferries ;

(b) for regulating the time and manner at and in which, the terms on which, and the person by whom, the tolls of such ferries may be let by auction ;

(c) for compensating persons who have compounded for tolls payable for the use of any such ferry when such ferry has been discontinued before the expiration of the period compounded for ; and

(d) generally to carry out the purposes of this Act ;

and, when the tolls of a ferry have been let under section eight, such Commissioner or other officer may, from time to time (subject as aforesaid), make additional rules consistent with this Act—

(e) for collecting the rents payable for the tolls of such ferries ;

(f) in cases in which the communication is to be established by means of a bridge of boats, pontoons or rafts, or a swing-bridge, flying-bridge or temporary bridge, for regulating the time and manner at and in which such bridge shall be constructed and maintained and opened for the passage of vessels and rafts through the same, and

(g) in cases in which the traffic is conveyed in boats, for regulating (1) the number and kinds of such boats and their dimensions and equipment ; (2) the number of the crew to be kept by the lessee for each boat ; (3) the maintenance of such boats continually in good condition ; (4) the hours during which, and the intervals within which, the lessee shall be bound to ply, and (5) the number of passengers, animals and vehicles, and the bulk and weight of other things, that may be carried in each kind of boat at one trip.

The lessee shall make such returns of traffic as the Commissioner or other officer as aforesaid may from time to time require.

13. No person shall, except with the sanction of the officer charged with the superintendence of a public ferry, keep a ferry-boat for the purpose of plying for hire or from any point within a distance of two miles from the limits of such public ferry :

Provided that, in the case of any specified public ferry, the Local Government may, by notification in the official Gazette, reduce or increase the said distance of two miles to such extent as it thinks fit :

Provided also that nothing hereinbefore contained shall prevent persons plying between two places, one of which is without, and one within, the said limits, when the distance between such two places is not less than three miles, or apply to boats which the Local Government expressly exempts from the operation of this section.

14. Whoever uses the approach to, or landing-place of, a public ferry is liable to pay the toll payable for crossing such ferry.

15. Tolls, according to such rates as are from time to time fixed by the Local Government, shall be levied on all persons, animals, vehicles and other things crossing any river by a public ferry and not employed or transmitted on the public service :

Provided that the Local Government may, from time to time, declare that any persons, animals, vehicles or other things shall be exempt from payment of such tolls.

Where the tolls of a ferry have been let under section eight, any such declaration, if made after the date of the auction, shall entitle the lessee to such abatement of the rent payable in respect of the tolls as may be fixed by the Commissioner

of the Division or such other officer as the Local Government may, from time to time, appoint in this behalf by name or in virtue of his office.

16. The lessee or other person authorized to collect the tolls of any public ferry shall affix a table of such tolls, legibly written or printed in the vernacular language, and also, if the Commissioner of the Division so directs, in English, in some conspicuous place near the ferry,

and shall be bound to produce, on demand, a list of the tolls, signed by the Magistrate of the District or such other officer as he appoints in this behalf.

17. Except as provided by section seven, all tolls, rents and compensation received by or on behalf of Government, and all fines levied, under this Act shall be disposed of as follows, that is to say :—

(a) in the territories administered by the Lieutenant-Governor of the North-Western Provinces, the residue of such tolls, rents, compensation and fines, after defraying thereout all charges incurred in carrying out this Act in those territories, shall be credited to the Fund constituted for those territories by the North-Western Provinces Local Rates Act, 1878 ;

(b) in the territories administered by the Chief Commissioner of Oudh, the residue as aforesaid shall be credited to the Fund constituted for those territories by the Oudh Local Rates Act, 1878 ;

(c) in the territories respectively administered by the Lieutenant-Governor of the Punjab and the Chief Commissioner of the Central Provinces, such tolls, rents, compensation and fines shall be credited to the Local Government and applied, first, to defraying all charges incurred in carrying out this Act in those territories respectively, and then, at the discretion of the Local Government, to any of the purposes specified in the second clause of section seven of the Punjab Local Rates Act, 1878, or the second clause of section five of the Central Provinces Additional Rates Act, 1878, as the case may be, and

(d) in the territories respectively administered by the Chief Commissioner of Assam and the Chief Commissioner of Ajmer and Merwara, such tolls, rents, compensation and fines shall be credited to the Local Government and applied, first, to defraying all charges incurred in carrying out this Act in those territories respectively, and then to such local works and establishments likely to promote the public health, comfort or convenience as the Local Government, subject to the control of the Governor General in Council, may from time to time direct.

18. The Local Government may, if it thinks fit, from time to time, fix rates at which any person may compound for the tolls payable for the use of a public ferry.

III.—PRIVATE FERRIES.

19. The Commissioner of the Division may, with the previous sanction of the Local Government, from time to time make rules for the maintenance of order and for the safety of passengers and property at ferries other than public ferries.

20. The tolls charged at such ferries shall not exceed the highest rates for the time being fixed under section fifteen for similar public ferries.

IV.—PENALTIES AND CRIMINAL PROCEDURE.

21. Every lessee or other person authorized to collect the tolls of a public ferry, who neglects to affix and keep in good order and repair the table of tolls mentioned in section sixteen,

or who wilfully removes, alters or defaces such table, or allows it to become illegible,

or who fails to produce on demand the list of the tolls mentioned in section sixteen,

and every lessee who neglects to furnish any return required under section twelve,

shall be punished with fine which may extend to fifty rupees.

22. Every such lessee or other person as aforesaid and any person in possession of a private ferry asking or taking more than the lawful toll, or without due cause delaying any person, animal, vehicle or other thing, shall be punished with fine which may extend to one hundred rupees.

23. Every person breaking any rule made under section twelve or section nineteen shall be punished with imprisonment for a term which may extend to six months, or with fine which may extend to two hundred rupees, or with both.

24. When any lessee of the tolls of a public ferry makes default in the payment of the rent payable in respect of such tolls, or has been convicted of an offence under section twenty-three, or having been convicted of an offence under section twenty-one or twenty-two, is again convicted of an offence under either of those sections,

the Magistrate of the District may, with the sanction of the Commissioner of the Division, cancel the lease of the tolls of such ferry, and make other arrangements for its management during the whole or any part of the term for which the tolls were let.

25. Every person crossing by any public ferry, or using the approach to, or landing-place thereof, who refuses to pay the proper toll, and every person—

who, with intent to avoid payment of such toll, fraudulently or forcibly crosses by any such ferry without paying the toll, or

who obstructs any toll-collector or lessee of the tolls of a public ferry, or any of his assistants, in any way in the execution of their duty under this Act, or

who, after being warned by any such toll-collector, lessee or assistant not to do so, goes or takes any animals, vehicles or other things into any ferryboat, or upon any bridge at such a ferry, which is in such a state or so loaded as to endanger human life or property, or

who refuses or neglects to leave, or remove any animals, vehicles or goods from, any such ferryboat or bridge, on being requested by such toll-collector, lessee or assistant to do so,

shall be punished with fine which may extend to fifty rupees.

26. Whoever conveys for hire any passenger, animal, vehicle or other thing in contravention of the provisions of section thirteen shall be punished with fine which may extend to fifty rupees.

27. Where the tolls of any public ferry have been let under the provisions hereinafore contained, the whole or any portion of any fine realized under section twenty-five or section twenty-six may notwithstanding anything contained in section seventeen, be, at the discretion of the convicting Magistrate or Bench of Magistrates, paid to the lessee.

28. Whoever navigates, anchors, moors or fastens any vessel or raft, or stacks any timber, in a manner so rash or negligent as to damage a public ferry, shall be punished with imprisonment for a term which may extend to three months, or with fine which may extend to five hundred rupees, or with both; and the toll-collector or lessee of the tolls of such ferry or any of his assistants, may

seize and detain such vessel, raft or timber pending the inquiry and assessment hereinafter mentioned.

29. The police may arrest without warrant any person committing an offence against section twenty-five or twenty-eight.

30. Any Magistrate or Bench of Magistrates having summary jurisdiction under chapter XVIII of the Code of Criminal Procedure may try any offence against this Act in manner provided by that chapter.

31. Every Magistrate or Bench of Magistrates trying any offence under this Act may enquire into and assess the value of the damage (if any) done or caused by the offender to the ferry concerned, and shall order the amount of such value to be paid by him in addition to any fine imposed upon him under this Act; and the amount so ordered to be paid shall be leviable as if it were a fine, or when the offence is one under section twenty-eight, by the sale of the vessel, raft or timber causing the damage, and of any thing found in or upon such vessel or raft.

The Commissioner of the Division may, on the appeal of any person deeming himself aggrieved by an order under this section, reduce or remit the amount payable under such order.

V.—MISCELLANEOUS.

32. When the lease of the tolls of any ferry is surrendered under section eleven or cancelled under section twenty-four, the Magistrate of the District may take possession of all boats and their equipment, and all other material and appliances, used by the lessee for the purposes of such ferry, and use the same (paying such compensation for the use thereof as the Local Government may in each case direct) until such Magistrate can conveniently procure proper substitutes therefor.

33. When any boats or their equipment, or any materials or appliances suitable for setting up a ferry, are emergently required for facilitating the transport of officers or troops of Her Majesty on duty, or of any other person on the business of Her Majesty, or of any animals, vehicles or baggage belonging to such officers, troops or persons, or of any property of Her Majesty, the Magistrate of the District may take possession of and use the same (paying such compensation for the use thereof as the Local Government may in each case direct) until such transport is completed.

34. No suit to ascertain the amount of any compensation payable, or abatement of rent allowable, under this Act shall be cognizable by any Civil Court.

35. The Local Government may, from time to time, delegate, under such restrictions as it thinks fit, any of the powers conferred on it by this Act to any Commissioner of a Division or Magistrate of a District, or to such other officer as it thinks fit, by name or by virtue of his office.

36. All matters determined, orders issued, acts done, penalties imposed and proceedings held in the territories administered by the Lieutenant Governor of the Punjab after the repeal of Bengal Regulation VI of 1819 by the Punjab Laws Act, 1872, section 4, and before this Act comes into force in such territories, shall, whenever such determinations, orders, acts, penalties or proceedings would have been lawful if the said Regulation had been in force, be deemed to have been respectively determined, issued, done, imposed and held in accordance with law.

NOTIFICATION.

Fort William, the 18th December 1878.

No. 28.—The following Statutes are published for general information :—

FOREIGN JURISDICTION ACT, 1878.

41 AND 42 VICT., CHAP. 67.

Arrangement of Sections.

SECTION.

1. *Construction of Act. and short titles.*
2. *Repeal of enactments in the Second Schedule.*
3. *Power for the Queen in Council to extend enactments in the First Schedule.*
4. *Validity of Orders made under Foreign Jurisdiction Acts.*
5. *Extension of Foreign Jurisdiction Acts over Her Majesty's subjects residing in countries without regular governments.*
6. *Jurisdiction over ships in Eastern seas.*
7. *Orders in Council to be laid before Parliament.*
8. *Provisions for protection of persons acting under Foreign Jurisdiction Acts.*

SCHEDULES :

FIRST SCHEDULE—*Enactments referred to.*

SECOND SCHEDULE—*Enactments repealed.*

An Act for extending and amending the Foreign Jurisdiction Acts.

[16TH AUGUST 1878.]

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows ; (that is to say,)

1.—(1). This Act shall be construed as one with the Foreign Jurisdiction Acts, 1843 to 1875, and those Acts together with this Act, may be cited as the Foreign Jurisdiction Acts, 1843 to 1878, and this Act may be cited separately as the Foreign Jurisdiction Act, 1878.

(2). The Acts whereof the titles are given in the First Schedule to this Act may be cited by the respective short titles given in that schedule.

2. The Acts mentioned in the Second Schedule to this Act are hereby repealed to the extent in the third column of that schedule mentioned : Provided that,—

- (1) any Order in Council, commission, or instructions made or issued in pursuance of any enactment hereby repealed, and in force at the passing of this Act, shall continue in force until altered or revoked by Her Majesty ; and
- (2) this repeal shall not affect anything done or suffered, or any right accrued or liability incurred before the passing of this Act ; and
- (3) any action, suit, or other proceeding affected by any enactment hereby repealed may be carried on in like manner as if this Act had not been passed.

3.—(1). It shall be lawful for Her Majesty the Queen in Council, if it seems fit, from time to time, by Order, to direct that all or any of the enactments described in the First Schedule to this Act, or any enactments for the time being in force amending or substituted for the same, shall extend, with or without any exceptions, adaptations, or modifications in the Order mentioned, to any country or place to which for the time being the Foreign Jurisdiction Act, 1843, applies.

6 & 7 Vict., c. 94.

(2). Thereupon those enactments shall operate as if that country or place were one of Her Majesty's Colonies, and as if Her Majesty in Council were the Legislature of that Colony.

4. An Order in Council purporting to be made in pursuance of the Foreign Jurisdiction Acts, 1843 to 1878, or any of them, shall be deemed a colonial law within the Colonial Laws Validity Act, 1865, that is to say, the Act of the session of the twenty-eighth and twenty-ninth years of the reign of Her present Majesty, chapter sixty-three, "to remove doubts as to the validity of colonial laws;" and any country or place to which any such Order extends shall be deemed a colony within that Act.

5. In any country or place out of Her Majesty's dominions, in or to which any of Her Majesty's subjects are for the time being resident or resorting, and which is not subject to any government from whom Her Majesty might obtain power and jurisdiction by treaty or any of the other means mentioned in the Foreign Jurisdiction Act, 1843, Her Majesty shall by virtue of this Act have power and jurisdiction over Her Majesty's subjects for the time being resident in or resorting to that country or place, and the same shall be deemed power and jurisdiction had by Her Majesty therein within the Foreign Jurisdiction Act, 1843.

6. It shall be lawful for Her Majesty the Queen in Council from time to time, by Order, to make, for the government of Her Majesty's subjects being in any vessel at a distance of not more than one hundred miles from the coast of China or of Japan, any law that to Her Majesty in Council may seem meet, as fully and effectually as any such law might be made by Her Majesty in Council for the government of Her Majesty's subjects being in China or in Japan.

7. Every Order in Council made in pursuance of the Foreign Jurisdiction Acts, 1843 to 1878, or any of them, shall be laid before both Houses of Parliament forthwith after it is made if Parliament be then in session, and if not, forthwith after the commencement of the then next session of Parliament.

8.—(1). An action, suit, prosecution, or proceeding against any person for any act done in pursuance or execution or intended execution or intended execution of the Foreign Jurisdiction Acts, 1843 to 1878, or any of them, or of any Order in Council made under the same, or of any power or jurisdiction of Her Majesty as is mentioned in the said Acts or any of them, or in respect of any alleged neglect or default in the execution of the said Acts or any of them, or of any such Order in Council, power, or jurisdiction as aforesaid, shall not lie or be instituted—

(a). in the court within Her Majesty's dominions, unless it is commenced within six months next after the act, neglect, or default complained of, or in case of a continuance of injury or damage, within six months next after the ceasing thereof, or where the cause of action arose out of Her Majesty's dominions, within six months after the parties to such action, suit, prosecution, or proceeding have been within the jurisdiction of the court in which the same is instituted.

(b). nor in any Her Majesty's courts without Her Majesty's dominions, unless the cause of action arose within the jurisdiction of that court, and the action is commenced within six months next after the act, neglect, or default complained of, or, in case of a continuance of injury or damage, within six months next after the ceasing thereof.

(2). In any such action, suit, or proceeding, tender of amends before the same was commenced may be pleaded in lieu of or in addition to any other plea. If the action, suit, or proceeding was commenced after such tender, or is proceeded with after payment into court of any money in satisfaction of the plaintiff's claim, and the plaintiff does not recover more than the sum tendered or paid, he shall not recover any costs incurred after such tender or payment, and the defendant shall be entitled to costs to be taxed as between solicitor and client, as from the time of such tender or payment; but this provision shall not affect costs on any injunction in the action, suit, or proceeding.

(3). So far as regards any action, suit, prosecution, or proceeding instituted after the passing of this Act, the provisions of this section shall supersede any provision for a like purpose which is contained in any Order in Council under the Foreign Jurisdiction Acts, 1843 to 1875, and is in force at the passing of this Act, and such provision shall cease to have any effect.

6 & 7 Vict., c. 94.
28 & 29 Vict., c. 116.
29 & 30 Vict., c. 87.
38 & 39 Vict., 85.

SCHEDULES.

FIRST SCHEDULE.

(Sections 1 and 3).

Enactments referred to.

Session and Chapter.	Title.	Short Title.
6 & 7 Vict., c. 34.	An Act for the better Apprehension of certain Offenders.	Fugitive Offenders Act, 1843.
12 & 13 Vict., c. 96.	An Act to provide for the Prosecution and Trial in Her Majesty's Colonies of Offences committed within the Jurisdiction of the Admiralty.	Admiralty Offences Colonial Act, 1849.
14 & 15 Vict., c. 99. Sections seven and eleven.	An Act to amend the law of evidence.	Evidence Act, 1851.
17 & 18 Vict., c. 104. Part X.	The Merchant Shipping Act, 1854.	
19 & 20 Vict., c. 113.	An Act to provide for taking evidence in Her Majesty's Dominions in relation to civil and commercial matters pending before Foreign Tribunals.	Foreign Tribunals Evidence Act, 1856.
22 Vict., c. 20.	An Act to provide for taking evidence in Suits and Proceedings pending before Tribunals in Her Majesty's Dominions, in places out of the jurisdiction of such Tribunals.	Evidence by Commission Act, 1859.
22 & 23 Vict., c. 63.	An Act to afford Facilities for the more certain Ascertainment of the Law administered in one Part of Her Majesty's Dominions when pleaded in the Courts of another Part thereof.	British Law Ascertainment Act, 1859.
23 & 24 Vict., c. 122.	An Act to enable the Legislatures of Her Majesty's Possessions Abroad to make Enactments similar to the Enactment of the Act fifth George the Fourth, chapter thirty-one, section eight.	Admiralty Offences Colonial Act, 1860.
24 & 25 Vict., c. 11.	An Act to afford facilities for the better ascertainment of the Law of Foreign Countries when pleaded in Courts within Her Majesty's Dominions.	Foreign Law Ascertainment Act, 1861.
30 & 31 Vict., c. 124. Section eleven.	The Merchant Shipping Act, 1867.	
37 & 38 Vict., c. 94. Section fifty-one.	The Conveyancing (Scotland) Act, 1874.	

SECOND SCHEDULE.

(Section 2).

Enactments repealed.

Session and Chapter.	Title.	Extent of Repeal.
6 & 7 Vict., c. 80.	An Act for the better Government of Her Majesty's subjects resorting to China.	The whole Act.
6 & 7 Vict., c. 94,	The Foreign Jurisdiction Act, 1843.	Section seven.

ACT No. XVIII OF 1878.

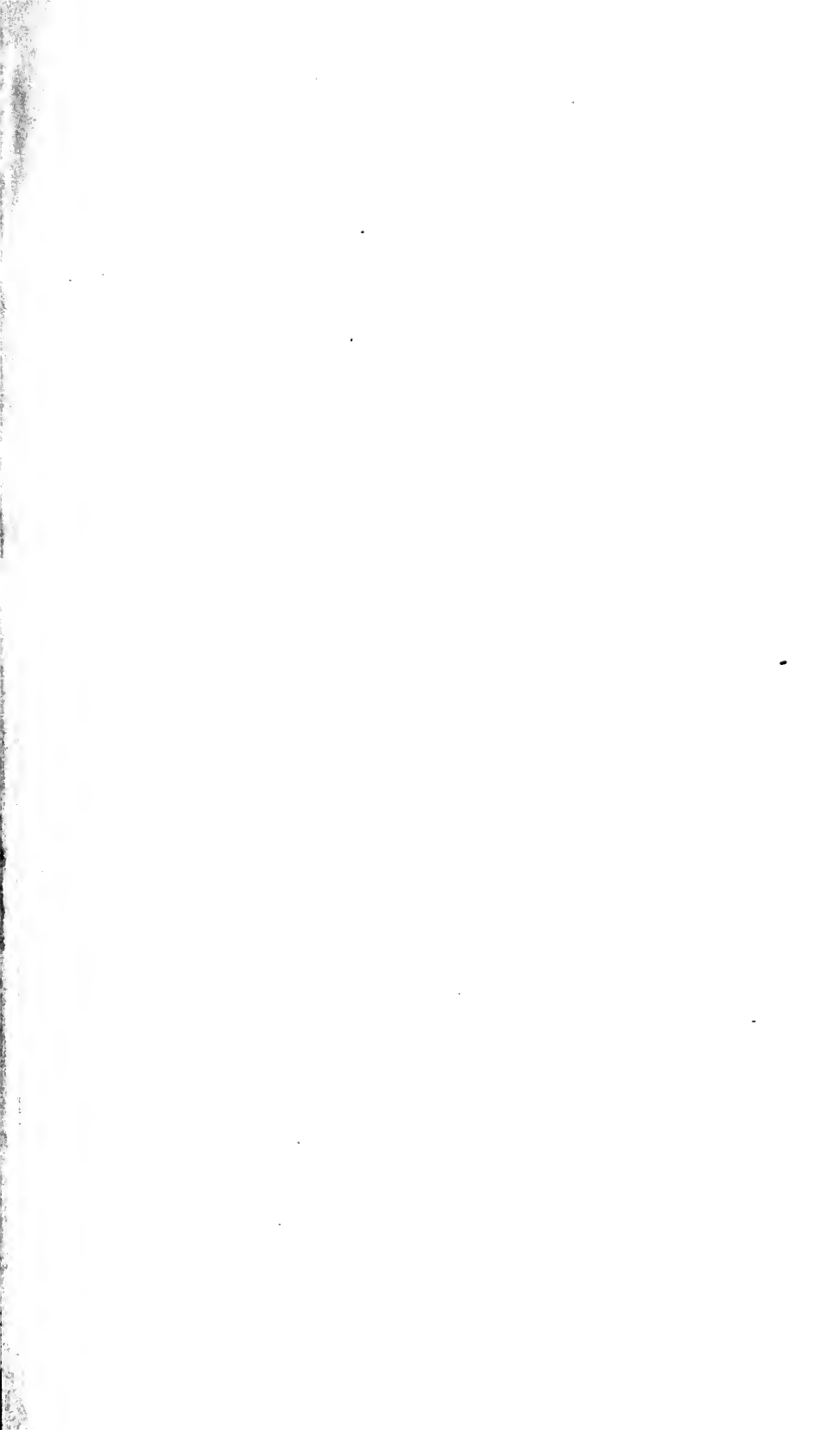
*An Act to amend the Code of Civil Procedure, Section 4.**(Passed on the 31st December 1878.)*

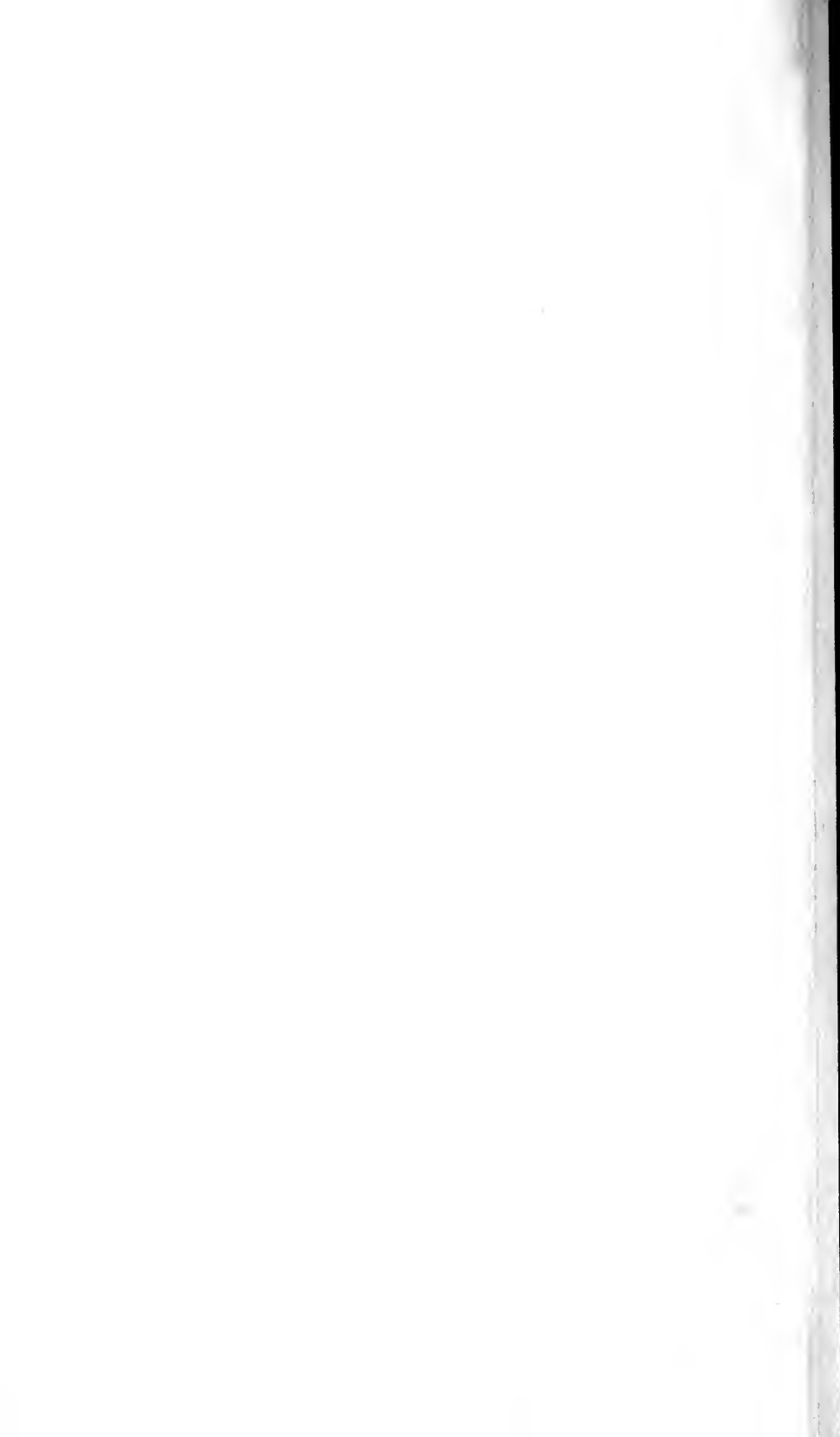
Whereas it is expedient to amend the Code of Civil Procedure, Section four ;

It is hereby enacted as follows :—

1. In the said Section for the words “local law” in each of the places where they occur, the words “any law heretofore or hereafter passed under the Indian Councils Act, 1861, by a Governor, or a Lieutenant-Governor, in Council” shall be substituted ; and for the words “landlord and tenant,” the words “landholders and their tenants or agents” shall be substituted.

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